SUPREME COURT
OF THE UNITED STATES

No. 10-283
Title: Toby Douglas, Director, California Department of Health Care Services, Petitioner
v.
Santa Rosa Memorial Hospital, et al.
Docketed: August 27, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-17633)
Decision Date: May 27, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 25 2010	Petition for a writ of certiorari filed. (Response due September 27, 2010)
Sep 14 2010	Order extending time to file response to petition to and including October 27, 2010, for all respondents.
Oct 27 2010	Brief of respondents Santa Rosa Memorial Hospital, et al. in opposition filed.
Nov 5 2010	Reply of petitioner David Maxwell-Jolly filed.
Nov 8 2010	DISTRIBUTED for Conference of November 23, 2010.
Dec 15 2010	DISTRIBUTED for Conference of January 7, 2011.
Jan 10 2011	DISTRIBUTED for Conference of January 14, 2011.
Jan 18 2011	Petition GRANTED limited to Question 1 presented by the petitions. The petitions for certiorari in No. 09-958 and No. 09-1158 are granted limited to Question 1 presented by the petitions. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Feb 17 2011	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including April 14, 2011. VIDED.
Feb 17 2011	The time to file respondents' briefs on the merits is extended to and including June 24, 2011. VIDED.
Apr 7 2011	The time to file the joint appendix and petitioners' briefs on the merits is further extended to and including May 19, 2011. VIDED.
Apr 7 2011	The time to file respondents' briefs on the merits is further extended to and including July 29, 2011. VIDED.
May 19 2011	Joint appendix filed. VIDED. (Statement of costs filed)
May 19 2011	Brief of petitioner Toby Douglas, Director, California Department of Health Care Services filed. VIDED.
May 25 2011	Brief amici curiae of National Governors Association, et al. filed. VIDED.
May 26 2011	Brief amicus curiae of the United States filed. VIDED.

May 26 2011	Brief amicus curiae of APA Watch filed. VIDED.
May 26 2011	Brief amici curiae of Michigan and 30 Other States filed. VIDED.
Jul 15 2011	CIRCULATED.
Jul 19 2011	SET FOR ARGUMENT ON Monday, October 3, 2011.
Jul 29 2011	Brief of respondents California Pharmacists, et al. filed. VIDED. (Distributed)
Jul 29 2011	Brief of respondents Santa Rosa Memorial Hospital, et al. filed. VIDED. (Distributed)
Jul 29 2011	Brief of respondents Dominguez, et al. filed. VIDED. (Distributed)
Jul 29 2011	Brief of respondents Independent Living Center of Southern California, Inc., et al. filed. VIDED. (Distributed)
Aug 4 2011	Brief amici curiae of National Association of Chain Drug Stores, et al. filed. VIDED. (Distributed)
Aug 5 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED. (Distributed)
Aug 5 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Aug 5 2011	Brief amici curiae of Members of Congress filed. VIDED. (Distributed)
Aug 5 2011	Brief amici curiae of American Medical Association, et al. filed. VIDED. (Distributed)
Aug 5 2011	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Aug 5 2011	Brief amici curiae of American Health Care Association, et al. filed. VIDED. (Distributed)
Aug 5 2011	Brief amici curiae of Former HHS Officials filed. VIDED. (Distributed)
Sep 1 2011	Reply of petitioners Toby Douglas, Director, California Department of Health Care Services filed. VIDED. (Distributed)
Sep 13 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope).
Sep 13 2011	Record from U.S.D.C. for Northern District of California is electronic.
Sep 27 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.
Oct 3 2011	Argued. For petitioner: Karin S. Schwartz, Supervising Deputy Attorney General, San Francisco, Cal.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Carter G. Phillips, Washington, D. C.)

Supreme Court, U.S.
FILED

No. 10-283 AUG 25 2010

RECORD AND BRIEFS

OFFICE OF THE CLERK

In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General
**Counsel of Record*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5461
Fax: (415) 703-5480
Gregory.Brown@doj.ca.gov
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTIONS PRESENTED

Under 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing "methods and procedures" to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), has concluded that this provision does not confer any "rights" on Medicaid providers or recipients that are enforceable under 42 U.S.C. § 1983, and respondents do not contend otherwise. Nonetheless, in the present case, the Ninth Circuit held that § 1396a(a)(30)(A) preempted a state law that reduced certain Medicaid reimbursement payments to providers, because the California Legislature failed to conduct a specific type of study that the Ninth Circuit said was required.

The questions presented are:

1. Whether Medicaid providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law that reduces reimbursement rates.

QUESTIONS PRESENTED – Continued

2. Whether a state law that reduces Medicaid reimbursements to providers may be held preempted by § 1396a(a)(30)(A) based on requirements that do not appear in the text of the statute.

LIST OF PARTIES

1. Petitioner is David Maxwell-Jolly, Director of the California Department of Health Care Services.

2. Respondents are Santa Rosa Memorial Hospital; St. Helena Hospital; Queen of the Valley Medical Center; Central Valley General Hospital; San Joaquin Community Hospital; San Antonio Community Hospital; Children's Hospital at Mission; Saddleback Memorial Medical Center; Orange Coast Memorial Medical Center; Anaheim Memorial Medical Center; Hoag Memorial Hospital Presbyterian; Heart Hospital of BK, LLC; John Muir Health; SRM Alliance Hospital Services; Lancaster Hospital Corporation; Fountain Valley Regional Hospital and Medical Center; and Mission Hospital Regional Medical Center.

TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Introduction	3
Statement of the Case	8
Reasons for Granting the Petition	15
Conclusion	28

Appendix

Memorandum, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. 09-17633 (9th Cir. May 27, 2010) ..... App. 1

Order Vacating Stay of Preliminary Injunction, and Restoring Preliminary Injunction; Staying Case, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Dec. 2, 2009) ..... App. 5

Order Staying Preliminary Injunction and Case, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Nov. 19, 2009) ..... App. 7

Order Granting Amended Motion and Preliminary Injunction, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Nov. 18, 2009) ..... App. 9

TABLE OF CONTENTS – Continued

Page

California Welfare and Institutions Code, § 14166.245 (effective February 16, 2008 to September 29, 2008) ..... App. 25

California Welfare and Institutions Code, § 14166.245 (effective September 30, 2008 to July 27, 2009) ..... App. 28

California Welfare and Institutions Code, § 14166.245 (effective July 28, 2009 to January 1, 2013) ..... App. 35

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 16

Arkansas Med. Soc'y, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 25

Bellsouth Telecomm. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001).....19

Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847 (9th Cir. 2009) 11

Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158) .....*passim*

Cort v. Ash, 422 U.S. 66 (1975) 16, 19

Dominguez v. Schwarzenegger, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. Cal. Pharmacists Ass'n*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158) 6, 22, 23, 24

Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 24

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 4, 16

Gray Panthers of San Francisco v. Schwarzenegger, No. C 09-2307 PJH, 2009 WL 2880555 (N.D. Cal. Sept. 1, 2009) 20

TABLE OF AUTHORITIES – Continued

Page

Hillsborough County v. Automated Med. Labs., 471 U.S. 707 (1985) 25

Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly, 572 F.3d 644 (9th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3500 (U.S. Feb. 16, 2010) (No. 09-958) ..... *passim*

Indep. Living Ctr. of S. Cal. v. Shewry, 543 F.3d 1050 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2828 (2009) 4, 18, 20

Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006) 18

Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640 (11th Cir. 1990) 7, 19

Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) 24

Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 24

Minn. HomeCare Ass'n v. Gomez, 108 F.3d 917 (8th Cir. 1997) 25

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) 4, 5, 15

Pa. Pharmacists Ass'n v. Houstoun, 283 F.3d 531 (3d Cir. 2002) (en banc) 17

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 16, 18, 26

Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001) 18

TABLE OF AUTHORITIES – Continued

Page

Pharm. Research & Mfrs. of Am. v. Thompson, 362 F.3d 817 (D.C. Cir. 2004) 18

Planned Parenthood of Houston & Se. Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005) 18

Rite Aid of Pa., Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) 24

Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) 4

St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands, 218 F.3d 232 (3d Cir. 2000) 18

V.L. v. Wagner, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) 20

W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 817 F.2d 222 (2d Cir. 1987) 18

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) 17

Wilderness Soc'y v. Kane County, 581 F.3d 1198 (10th Cir. 2009), *rehearing en banc granted*, 595 F.3d 1119 (10th Cir. 2010) 18, 19

Wyeth v. Levine, ___ U.S. ___, 129 S. Ct. 1187 (2009) 25

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 11

42 U.S.C. § 672(a) 20

42 U.S.C. § 675(4)(A) 20

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396a(a)(17) 20

42 U.S.C. § 1396a(a)(30)(A) ..... *passim*

42 U.S.C. § 1983 ..... *passim*

Cal. Welf. & Inst. Code § 14166.245 9

Cal. Welf. & Inst. Code § 14166.245(c)(3) 9

Cal. Welf. & Inst. Code § 14166.245(f) 10

American Recovery & Reinvestment Act of 2009, H.R. 1, 111th Cong., Pub. L. No. 111-5 (1st Sess. 2009) 20

CONSTITUTIONAL PROVISIONS

Spending Clause, United States Constitution, article I, § 8, clause 1 ..... 15, 18, 20

Supremacy Clause, United States Constitution, article VI, clause 2 ..... *passim*

OTHER AUTHORITIES

42 C.F.R. § 440.230(b) 20

H.R. Rep. No. 105-149 (1997) 17

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of David Maxwell-Jolly, Director of the California Department of Health Care Services (DHCS), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This petition seeks review of the opinion issued by the Ninth Circuit Court of Appeals on May 27, 2010. This opinion was not designated for publication. App., *infra*, 1. The three district court orders that led to the Ninth Circuit's opinion are unreported. App., *infra*, 5, 7, 9.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion on May 27, 2010. App., *infra*, 1. Petitioner has not petitioned for rehearing or rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), states in pertinent part:

> (a) Contents
>
> A State plan for medical assistance must –
>
> * * *
>
> (30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. . . .

42 U.S.C. § 1396a(a)(30)(A).

California Welfare and Institutions Code section 14166.245 is set forth in the Appendix. App., *infra*, 25, 28, 35.

INTRODUCTION

This petition raises substantially the same legal issues as the petitions for certiorari pending in *Maxwell-Jolly v. Independent Living Center of Southern California*, No. 09-958 (*Independent Living*), and *Maxwell-Jolly v. California Pharmacists Association*, No. 09-1158 (*California Pharmacists*). Those issues are (1) whether 42 U.S.C. § 1396a(a)(30)(A), a federal Medicaid statute that does not meet the criteria for private enforcement under 42 U.S.C. § 1983, may nonetheless be enforced against a state by private parties under a Supremacy Clause theory; and (2) whether a state statute that reduces Medicaid reimbursement rates to providers may be held preempted by § 1396a(a)(30)(A) based on requirements that do not appear anywhere in the statute.

This case is the latest in a line of Ninth Circuit decisions first creating, and then expanding, an atextual requirement that states must conduct a particular "study" before making reductions in Medicaid reimbursement rates. This requirement is not found in § 1396a(a)(30)(A)'s statutory text or its implementing regulations, and the Ninth Circuit's imposition of this requirement conflicts with every

other circuit to consider this issue – specifically, the First, Third, Fifth, Seventh, and Eighth Circuits.

The Ninth Circuit first created this "study" requirement in *Orthopaedic Hospital v. Belshe*, where it held that under § 1396a(a)(30)(A) a state "must rely on responsible cost studies, its own or others', that provide reliable data as a basis for its rate setting." 103 F.3d 1491, 1496 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). However, *Orthopaedic* was brought pursuant to 42 U.S.C. § 1983, and, following this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Ninth Circuit effectively nullified *Orthopaedic* by holding that § 1396a(a)(30)(A) is not privately enforceable under § 1983. *See Sanchez v. Johnson*, 416 F.3d 1051, 1055-62 (9th Cir. 2005) (holding that the language and structure of § 1396a(a)(30)(A) do not evince any Congressional intent to create rights enforceable by Medicaid beneficiaries or providers).

In *Independent Living*, the Ninth Circuit revived *Orthopaedic*'s atextual "study" requirement in two steps. First, the Ninth Circuit held that the Supremacy Clause permits an end run around the requirement set forth in *Gonzaga* and other cases that, for there to be a private cause of action to enforce a federal statute, Congress must have unambiguously created a private substantive right and a private remedy. *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) (*Indep. Living I*), *cert. denied*, 129 S. Ct. 2828 (2009). Second, the Ninth Circuit held that *Orthopaedic*'s judicially created

"study" requirement *preempts* any state laws that reduce Medicaid rates in the absence of such a study. *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) (*Indep. Living II*), *petition for cert. filed*, 78 U.S.L.W. 3500 (U.S. Feb. 16, 2010) (No. 09-958).

In *California Pharmacists Association v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010) (*California Pharmacists*), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), the Ninth Circuit expanded this already atextual "study" requirement in several ways. Specifically, *California Pharmacists* held, *inter alia*, that (1) a state must conduct the study *prior to enacting* the rate reduction (contradicting *Orthopaedic*, 103 F.3d at 1494, which had permitted a rate reduction to be implemented while the State completed the required study); (2) the state *legislature*, rather than the relevant state agency, must discharge the study requirement if the rate reduction is enacted by statute; (3) the study must expressly reference both § 1396a(a)(30)(A) and the specific statutory enactment at issue; (4) a study prepared specifically for a state legislature does not suffice unless the state *produces evidence that the legislature actually considered it*, and that evidence must consist of more than a reference to the study in a legislative committee agenda; and (5) the state must create a means of obtaining provider cost data if no such means currently exists; however, if no provider cost data exists, the state may use a proxy, but

the court has broad discretion to second-guess (and reject) the choice of proxy.

In *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. California Pharmacists Association*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), the Ninth Circuit further expanded its "study" requirement. *Dominguez* held, *inter alia*, that (1) the state must conduct the study *even where it is not setting rates*, if the court determines that the state's actions could potentially have an impact on the rate-setting process; (2) the state must figure out a way to "study" costs *even if the providers in question do not incur any costs and provide only hourly labor*; and (3) the *only* permissible "metho[d] and procedur[e]" to assure that payments are consistent with efficiency, economy, quality of care, and access under § 1396a(a)(30)(A) is to conduct the specified "study," and the state *may not* use any alternative "methods and procedures" – such as setting rates through collective bargaining with the provider unions – to meet the Ninth Circuit's ever-shifting § 1396a(a)(30)(A) requirements.

In the present case, the Ninth Circuit has taken these atextual requirements one step further, holding that (1) the state must conduct a "study" even where a study would be pointless and inferior to the actual information from which the reimbursement rates are derived – namely, each hospital's individual reported costs; (2) the legislature must conduct a pre-enactment "study" even where it enacts a statute that

requires DHCS to study each hospital's reported costs through an audit prior to determining each hospital's "audited allowable costs," and sets the reimbursement rate at a reasonable percentage (90%) of those costs; (3) a Legislative Analyst's Office report provided to the legislature prior to enactment is not a sufficient "study," even where this report recommended not only that the specific rate reduction at issue be approved, but that the size of the reduction be *increased*; (4) a California Medical Assistance Commission report to the legislature is not a sufficient "study," even where it shows that a reduction in noncontract hospital reimbursement rates was appropriate to reduce the disparity in payments between contract and noncontract hospitals; (5) the legislature must conduct a pre-enactment study even where DHCS's pre-implementation studies established that the reduced rates would bear a reasonable relationship to hospitals' costs and would comply with the efficiency, economy, quality of care, and access requirements; and (6) the state was required to conduct a pre-enactment study even where post-implementation evidence conclusively demonstrates that the rate reduction (which was in place for more than 16 months before being preliminarily enjoined) has not, and will not, have any negative impact on quality of care or access to care.

As petitioner Maxwell-Jolly demonstrated in the *Independent Living* and *California Pharmacists* petitions, the Ninth Circuit's decision to allow private enforcement of § 1396a(a)(30)(A), coupled with its

willingness to impose ever-expanding atextual requirements, has created a new class of lawsuits that is wreaking havoc with California's ability to manage its $40 billion Medicaid budget and its ability to plan its way out of its budget crisis through sensible Medicaid reform. Untethered from any statutory or regulatory language, the rules announced by the Ninth Circuit keep changing, and they become more onerous with each iteration. Congress put an administrative agency, rather than the courts, in charge of Medicaid for a reason: to work with the states on an ongoing basis, with regular communication and guidance, to ensure that they understand and comply with Medicaid requirements. Court-imposed injunctions, issued in private suits based on judicially created, atextual requirements, that subject the States to massive liability, undermine Congressional intent and the cooperative federalism that is supposed to animate the program. These issues are important, recurring, national in scope, and the subject of conflicting and erroneous decisions among the circuits (as demonstrated in the *Independent Living* and *California Pharmacists* petitions), and therefore merit review.

STATEMENT OF THE CASE

1. On February 16, 2008, the California Legislature enacted AB 5, which, *inter alia*, reduced by

10% the reimbursement rates for inpatient services provided by "noncontract hospitals"[1] under Medi-Cal, California's version of the federal-state Medicaid program. *See* App., *infra*, 25. Specifically, California Welfare and Institutions Code § 14166.245 states that "[w]hen calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement for dates of service on and after July 1, 2008, shall be limited to . . . [n]inety percent of the hospital's audited allowable cost[s]." *See* App., *infra*, 26, 31, 38; Cal. Welf. & Inst. Code § 14166.245(c)(3).[2]

The Legislature delayed the implementation of § 14166.245 for over four months after its enactment, to July 1, 2008, for the specific purpose of allowing DHCS to analyze the potential impact of this 10% reduction. The Bill Analysis from the Assembly Committee on Budget states:

> The primary purpose of the delay of the reduction until the start of the new fiscal year [July 1, 2008] is to allow time for further

---

[1] Most California hospitals are "contract hospitals," meaning that they negotiate contractual Medi-Cal reimbursement rates with the State. Hospitals that do not agree to contractual Medi-Cal reimbursement rates are known as "noncontract hospitals."

[2] Section 14166.245 was amended by AB 1183 in September 2008 to add additional rate reductions. App., *infra*, 28-34. However, AB 1183's additional rate reductions were previously enjoined in a separate case, and accordingly only the 10% reduction under AB 5 is at issue here. App., *infra*, 11.

> review of provider rates during the regular budget process *to identify any particularly critical consequences of the reduction and to evaluate the possibility of using a more refined approach* to mitigate those consequences while still achieving savings.

See Cal. Bill Analysis, AB 5 Assem. (February 14, 2008) (emphasis added) (available online at www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0001-0050/abx3_5_cfa_20080214_132238_asm_comm.html).

The California Legislature directed DHCS to "promptly seek all necessary federal approvals in order to implement this section, including necessary amendments to the state plan." App., *infra*, 27; Cal. Welf. & Inst. Code § 14166.245(f). On September 30, 2008, DHCS submitted a State Plan Amendment (SPA) to the federal Centers for Medicare and Medicaid Services (CMS), which remains pending. That SPA encompassed all of the AB 5 reductions, including the 10% reduction in rates for inpatient services in noncontract hospitals. In response to a request from CMS, DHCS subsequently split the September 30, 2008 SPA into four separate SPAs that it submitted on October 29, 2008.

2. On November 14, 2008, respondents filed a complaint for injunctive and declaratory relief in the Northern District of California seeking to invalidate AB 5's 10% rate reduction for inpatient services provided by noncontract hospitals, as well as additional rate reductions enacted under AB 1183. Respondents sought relief under the Supremacy Clause

of the United States Constitution, and the district court had jurisdiction pursuant to 28 U.S.C. § 1331. Respondents filed an amended complaint seeking this same relief on December 4, 2008. On January 14, 2009, *almost 11 months after AB 5 was enacted and more than six months after it was implemented*, respondents filed a motion for preliminary injunction to enjoin the rate reductions under AB 5 and AB 1183. On February 23, 2009, the district court denied the motion and stayed the case pending the Ninth Circuit's decision in *Independent Living II*, which was subsequently issued on July 9, 2009.[3] On September 9, 2009, the district court lifted the stay, and on October 12, 2009, respondents filed an amended motion for preliminary injunction, in which they sought to enjoin only the rate cuts under AB 5, noting that the additional rate reductions under AB 1183 had already been enjoined by the Ninth Circuit on April 6, 2009 in *California Pharmacists Association v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009).

In opposing the preliminary injunction, DHCS submitted a broad array of evidence concerning the legislative process that led to the enactment of AB 5,

---

[3] The procedural history of the stay is somewhat complex and includes an interlocutory appeal to the Ninth Circuit, a remand, a brief lifting of the stay in June 2009, and then a further stay pending a hearing before the United States Judicial Panel on Multidistrict Litigation on a motion to transfer this case to the Central District of California (which was denied).

as well as extensive evidence concerning the impact of the 10% rate reduction.

Specifically, there were three relevant studies before the Legislature prior to the enactment of AB 5. First, a Legislative Analyst's Office (LAO) Report analyzing the 2008-2009 budget specifically analyzed the rate cuts for inpatient services in noncontract hospitals and recommended not only that they be approved, but that these cuts *be even deeper*. Second, the California Medical Assistance Commission (CMAC) Annual Report to the Legislature for 2007 showed that noncontract hospitals provided just 11.2% of Medi-Cal inpatient services but received 20.1% of Medi-Cal payments for those services, costing the Medi-Cal program almost twice as much as contract hospitals relative to the services provided. The CMAC Report also found that contract hospitals saved the State over $551 million in fiscal year 2006-2007 compared to what the State would have paid if these hospitals had been noncontract hospitals. Third, in November 2005, DHCS had conducted an analysis of similar 10% rate cuts in fiscal year 2004-2005 and found that they complied with federal law and would not impact quality of care or access to care, both considerations under § 1396a(a)(30)(A).

After AB 5 was enacted, but prior to its July 1, 2008 implementation, DHCS conducted additional studies of AB 5's potential impact for the specific purpose of assessing AB 5's compliance with § 1396a(a)(30)(A) as interpreted by the Ninth Circuit. In those studies, DHCS found that a noncontract

hospital's "audited allowable costs" are usually approximately 97-98% of its reported costs, and thus that the 10% reduction would still compensate approximately 87-88% of hospitals' reported costs. In addition, DHCS's studies noted that all noncontract hospitals would be compensated at a minimum of 90% of their audited allowable costs, and that this was within the "range of reasonableness" that federal courts found acceptable under the reasonable-cost-based rate standard of the Boren Amendment. DHCS's studies further noted that many noncontract hospitals receive supplemental reimbursements on top of their basic rate, which pushes total reimbursement above 100% of audited allowable costs for several hospitals, even after the 10% reduction.

Finally, after AB 5 was implemented, DHCS updated its analysis of the 10% rate cut's compliance with § 1396a(a)(30)(A) twice more (in January 2009 and again in February 2009), confirming that these cuts are consistent with efficiency, economy, quality of care, and access. Specifically, DHCS found that AB 5's cuts would reduce the 17 respondent hospitals' aggregate revenues by just 0.6%, and reduce their aggregate net profits – which totaled $355 million in 2007 – by less than 4%. In addition, DHCS noted that approximately 89-90% of Medi-Cal hospital inpatient days are provided by contract hospitals, with noncontract hospitals providing the remaining 10-11%. And DHCS further noted that small and rural noncontract hospitals were exempted from these payment reductions for dates of service on or after

November 1, 2008, eliminating any concerns that the reductions might have a greater impact on such hospitals due to their unique circumstances. Based on these findings and the findings in the other studies, DHCS determined that AB 5's reimbursement reductions for inpatient services by noncontract hospitals would not affect quality of care or access to care. Indeed, despite the fact that these cuts were in effect for more than 16 months before they were enjoined, there is no evidence that they have caused any problems with quality of care or access.

On November 18, 2009, the district court entered an order preliminarily enjoining DHCS from implementing AB 5's rate cuts for inpatient services in the 17 respondent hospitals. App., *infra*, 9-24. The district court held that such cuts are preempted by § 1396a(a)(30)(A) because the State did not conduct the "study" required by *Independent Living II*. App., *infra*, 13-20. Although there are numerous studies in the record showing that these cuts comply with § 1396a(a)(30)(A) and would not impact access or quality of care, the district court held that AB 5 was preempted because there was insufficient evidence that the Legislature or DHCS had specifically "considered" these studies in enacting AB 5. App., *infra*, 16-18. On November 19, 2009, the district court stayed the entire case, including the preliminary injunction it had issued the previous day. App., *infra*, 7-8. However, on December 2, 2009, the court reversed itself and issued an order vacating the stay in

part and restoring the preliminary injunction. App., *infra*, 5-6.

3. DHCS appealed the orders granting and restoring the preliminary injunction, and on May 27, 2010, the Ninth Circuit affirmed the preliminary injunction in an unpublished decision. App., *infra*, 1-4. DHCS argued that the *Orthopaedic – Independent Living – California Pharmacists* line of cases is distinguishable because none of the rates at issue in those cases were based on providers' costs, while here the reimbursement rates for inpatient services in noncontract hospitals are *specifically based on each individual hospital's audited allowable costs*, thereby rendering any "study" unnecessary. However, the Ninth Circuit rejected DHCS's arguments, holding that prior line of cases controlling and extending its atextual § 1396a(a)(30)(A) requirement to robotically mandate a "study" in *all circumstances*, even where such a study would serve no purpose because rates are already based on providers' actual costs. App., *infra*, 1-4.

REASONS FOR GRANTING THE PETITION

1. The Court should grant the petition to consider whether a private party may bring a preemption challenge under a Spending Clause statute, 42 U.S.C. § 1396a(a)(30)(A), that is not otherwise enforceable by private parties under 42 U.S.C. § 1983 or an implied right of action theory. This issue is already

pending before this Court in the petitions for certiorari filed in *Independent Living*, No. 09-958, and *California Pharmacists*, No. 09-1158.

As demonstrated in the *Independent Living* and *California Pharmacists* petitions, review is warranted because the Ninth Circuit's decision on this issue conflicts with this Court's precedent establishing limits on private rights of action against the states. To bring a private suit to enforce a federal statute, a plaintiff must show clear and unambiguous evidence of Congressional intent to create both a private right of action and a private remedy under that statute, and further that the provision to be enforced is not so "vague and amorphous" as to strain judicial competence. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *Gonzaga*, 536 U.S. at 280-86. "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Absent clear evidence of Congressional intent "to create not just a private right but also a private remedy . . . a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

The Ninth Circuit's theory exempts all Supremacy Clause actions from these requirements, holding that any plaintiff who alleges a conflict between state and federal law *automatically* has a private right of action, regardless of whether or not Congress intended to create one. Indeed, the Ninth Circuit's theory permits a private right of action *even where Congress clearly and unambiguously intended not to permit one.* That is precisely the case with § 1396a(a)(30)(A), where Congress, in repealing the Boren Amendment, evinced a clear intent not only to reverse parts of *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 502 (1990), which had held that the Boren Amendment's rate-setting requirements were privately enforceable under § 1983, but also to preclude private provider challenges to Medicaid rates under other provisions. "It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of [§ 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." H.R. Rep. No. 105-149, at 591 (1997); *see also Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 540 n.15 (3d Cir. 2002) (en banc) (Alito, J.) ("One of Congress's main objectives – perhaps its dominant objective – in repealing the Boren Amendment was to take away the right to sue under § 1983."). This Court has recognized that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but

rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28.

Review also is warranted to resolve a conflict among the courts of appeals on this issue. The D.C., Fifth, Eighth, and Ninth Circuits have held that private parties may bring preemption claims under Spending Clause statutes even if Congress did not intend to make the statutes privately enforceable. *See Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Lankford v. Sherman*, 451 F.3d 496, 509-13 (8th Cir. 2006); *Independent Living I*, 543 F.3d at 1055-65 (9th Cir. 2008).[4]

Meanwhile, the Eleventh Circuit has squarely held that "the Supremacy Clause does not grant an

---

[4] The First Circuit, while not addressing the precise question presented here, has indicated a willingness to allow private causes of action for preemption based on Spending Clause statutes even where the statute in question is not privately enforceable. *See Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001). Several other circuits, meanwhile, while not having addressed this issue in the context of a Spending Clause statute, nonetheless have held that at least some preemption claims may be brought under non-Spending Clause statutes regardless of whether the federal statutes create privately enforceable rights. *See, e.g., W. Air Lines, Inc. v. Port Auth. of N.Y. & N.J.*, 817 F.2d 222, 225-26 (2d Cir. 1987); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Wilderness Soc'y v. Kane County*, 581 F.3d 1198 (10th Cir. 2009), *rehearing en banc granted*, 595 F.3d 1119 (10th Cir. 2010).

implied cause of action," and that private rights of action to enforce statutory rights must be created by Congress in accordance with the criteria set forth in *Cort*. *See Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 641, 643-44 (11th Cir. 1990); *see also Bellsouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169, 1189-92 (11th Cir. 2001) (applying *Cort* factors in assessing whether a private preemption claim could proceed). The Tenth Circuit's decision in *Wilderness Society* also deserves mention for its lengthy dissent by Judge McConnell rejecting "the astounding idea that any time a state action arguably conflicts with a federal law, a cause of action exists" under the Supremacy Clause. 581 F.3d at 1233. Judge McConnell cited this Court's well established rule that, "[u]nless Congress has expressly or impliedly granted private persons a cause of action to enforce federal law . . . there is no basis for such a suit." *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982)). He further cautioned that, "[i]f 'preemption' were a sufficient basis for a cause of action, then every federal statute would implicitly authorize a private cause of action against a state or local governmental defendant. That is not the law." *Id.*

The Ninth Circuit's theory (also embraced by the D.C., Fifth, and Eighth Circuits) has opened up a flood of new litigation challenging state actions under the Supremacy Clause based on federal statutes that are not privately enforceable under § 1983 or an implied right of action. In addition to the dozens

(literally) of § 1396a(a)(30)(A) lawsuits filed in the wake of *Independent Living I* and *II*, plaintiffs in California and many other states also have been bringing preemption challenges under numerous other federal statutes and regulations, including 42 U.S.C. § 1396a(a)(17) and 42 C.F.R. § 440.230(b), *see V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009); a purely hortatory "purposes" provision of the American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong., Pub. L. No. 111-5 (1st Sess. 2009), § 5000(a), *see Gray Panthers of San Francisco v. Schwarzenegger*, No. C 09-2307 PJH, 2009 WL 2880555 (N.D. Cal. Sept. 1, 2009); and the Child Welfare Act, 42 U.S.C. §§ 672(a) & 675(4)(A). *See Morales v. Wagner*, Nos. CPF 05-505687, 05-505783, & 05-505888 (Cal. Super. Ct. (San Francisco)). All told, DHCS is aware of over 40 Supremacy Clause lawsuits across the country that have been spurred by the Ninth Circuit's *Independent Living* decisions. The Supremacy Clause injunctions in California alone have already cost the State almost $1 billion in lost Medicaid savings, and those losses are likely to continue to grow as additional new cases are filed.

Moreover, the Ninth Circuit's Supremacy Clause theory will inevitably lead to even more conflict and confusion among the circuits, not just with respect to § 1396a(a)(30)(A), but also with regard to virtually any Spending Clause statute that Congress did not intend to make privately enforceable. Rather than permitting the Department of Health and Human Services (HHS) to exercise its regulatory duties

as Congress intended, which would ensure uniform interpretation and application of the Medicaid Act's requirements by a single agency with the appropriate expertise, the Ninth Circuit's rule instead thrusts the courts into this regulatory role. This will certainly lead to more inconsistent interpretations across various jurisdictions, as courts will be forced to grapple with precisely those "vague and amorphous" statutory provisions that Congress never intended to be privately enforced.

Petitioner believes that both *Independent Living* and *California Pharmacists* are excellent vehicles for deciding the first question presented for the reasons set forth in those petitions. This case presents an excellent vehicle as well, as petitioner expressly preserved this first question presented in both the district court and the Ninth Circuit, and this case presents a fully developed record for the Court's review.

2. The Court also should grant the petition to consider whether state statutes that reduce Medicaid reimbursement payments to certain providers may be preempted based on requirements that do not appear in the text of the preempting federal statute, § 1396a(a)(30)(A). This issue, too, is already pending before this Court in both the *Independent Living*, No. 09-958, and *California Pharmacists*, No. 09-1158, petitions for certiorari.

The present case is the latest in a series of cases in which the Ninth Circuit has imposed an ever-changing, judicially created rule, under the guise of

interpreting § 1396a(a)(30)(A), that state laws reducing Medicaid reimbursement rates are preempted unless the state (1) studied the impact of the reductions on the § 1396a(a)(30)(A) factors of efficiency, economy, quality of care, and access; and (2) considered responsible studies of providers' costs, to ensure that the reduced rates would bear a reasonable relationship to those costs. *Independent Living II*, 572 F.3d at 651-52. However, neither § 1396a(a)(30)(A) nor any of its implementing regulations requires any type of study, nor do they require that rates bear any relationship to providers' costs.

In *California Pharmacists* and *Dominguez*, the Ninth Circuit dramatically expanded these already atextual requirements, requiring that:

(1) The study must be completed *prior to enactment* of the rate reduction, and not merely prior to implementation. *Cal. Pharmacists*, 596 F.3d at 1105-07.

(2) If the rate reductions are imposed by statute, the study obligation must be discharged *by the legislature itself*, and not another state agency. *Cal. Pharmacists*, 596 F.3d at 1105-07.

(3) The study must expressly reference both § 1396a(a)(30)(A) and the specific statutory enactment at issue. *Cal. Pharmacists*, 596 F.3d at 1107-09; *Dominguez*, 596 F.3d at 1097.

(4) The state must produce evidence to show that the legislature *actually "consider[ed]"* the studies

that were before it. The Ninth Circuit does not specify how much, or what type, of evidence is required, but held that a reference to the study in a legislative agenda is not sufficient.[5] *Cal. Pharmacists*, 596 F.3d at 1107-09; *Dominguez*, 596 F.3d at 1097.

(5) The state must figure out a way to "study" costs *even if the providers in question do not incur any costs and provide only hourly labor*. If the state does not have a means of obtaining provider cost data, it must either create a means to obtain such data or, if such data is unavailable, rely on a proxy. If the state relies on a proxy, the court has broad discretion to second-guess (and reject) the state's choice of proxy. *Cal. Pharmacists*, 596 F.3d at 1112; *Dominguez*, 596 F.3d at 1096-97.

(6) The state must conduct the study *even where it is not setting rates*, if the court determines that the state's actions could potentially have an impact on the rate-setting process. *Dominguez*, 596 F.3d at 1093-96.

---

[5] For example, how many members of the legislature must "actually consider" the study for it to count? May legislators rely on the advice of colleagues and/or staff members, or must each individual legislator personally read the study? Are legislators required to submit declarations, or include official findings in the text of the statute, to show that they considered the study? If not, how else might they show that they "actually considered" a study that was before them? These questions seem absurd, but under the Ninth Circuit's rule *a state legislature cannot make Medicaid rate reductions without answering them*.

(7) The *only* permissible "metho[d] and procedur[e]" to assure that payments are consistent with efficiency, economy, quality of care, and access under § 1396a(a)(30)(A) is to conduct the specified "study." The state *may not* use any alternative "methods and procedures" – such as setting rates through collective bargaining with the provider unions – to meet the Ninth Circuit's ever-shifting § 1396a(a)(30)(A) requirements. *Dominguez*, 596 F.3d at 1093-96.

In the present case, the Ninth Circuit expanded its judicially created "study" requirement to an even more absurd degree, requiring the state to "study" the § 1396a(a)(30)(A) factors and providers' costs even where the statute expressly provides that rates are based on each individual hospital's costs, and even where those costs are required to be studied by DHCS, via an audit, prior to the final "cost report settlement." App., *infra*, 26, 31, 38.

Review is warranted because the Ninth Circuit's atextual interpretation of § 1396a(a)(30)(A) conflicts with the holdings of every other circuit to address this issue – specifically, the First, Third, Fifth, Seventh, and Eighth Circuits. *See Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 56 (1st Cir. 2004); *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999); *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 933 n.33 (5th Cir. 2000), *overruled in part on other grounds*, *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 704 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 34 (2008); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1030

(7th Cir. 1996); *Minn. HomeCare Ass'n v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997) (per curiam).[6]

Moreover, the Ninth Circuit's repeated willingness to stretch and change this judicially created, atextual rule as a basis for federal preemption of state laws conflicts with this Court's longstanding preemption precedents. The Ninth Circuit's holding that preemption can be based upon a judicially created rule, entirely divorced from anything that Congress intended, conflicts with this Court's holding that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 1194 (2009). In addition, the Ninth Circuit's holding that preemption can arise from a statute as vague and amorphous as § 1396a(a)(30)(A) directly undermines this Court's precedents establishing a strong presumption against federal preemption of state laws regulating health and safety "unless that was the clear and manifest purpose of Congress." *Id.* at 1195; *see also Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985) (recognizing "the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy

---

[6] While the Eighth Circuit has required states to "consider" the impact of rate changes before implementing them, *see Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 531 (8th Cir. 1993), it has made clear that no study or other "formal analysis" is required, particularly where the reduction is implemented by statute and thus subject to the legislative process. *See Minn. HomeCare*, 108 F.3d at 918.

Clause"); *Pennhurst*, 451 U.S. at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

The impact of the Ninth Circuit's ever-shifting requirements has been devastating, crippling California's ability to manage its $40 billion Medicaid program by rendering every decision subject to a potential court-imposed injunction based on constantly changing rules that are untethered to any statutory or regulatory text. These injunctions have cost the State of California almost $1 billion to date, with greater losses certain to follow if this Court does not intervene. Further, the Ninth Circuit has usurped a significant portion of the regulatory oversight that Congress expressly delegated to HHS under the Medicaid program, subjecting states to inconsistent and unpredictable requirements. Review is warranted to effectuate Congressional intent and restore the proper roles of the courts and regulatory agencies in the oversight of the Medicaid program.

Petitioner believes that the *Independent Living* and *California Pharmacists* petitions are both excellent vehicles for reaching the second question presented for the reasons set forth in those petitions. In particular, *California Pharmacists* presents this issue in the context of two published opinions setting forth in great detail the Ninth Circuit's extensive judicially created requirements that lack any textual support in

§ 1396a(a)(30)(A). However, in the instant case the Ninth Circuit has expanded those requirements to an even further extreme. If the Court would prefer to reach the full panoply of requirements that the Ninth Circuit has now imposed, it should grant the present petition (and hold the *Independent Living* and *California Pharmacists* petitions pending the disposition of this case).

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August 25, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General

**Counsel of Record*
Counsel for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANTA ROSA MEMORIAL HOSPITAL, a California corporation; et al., Plaintiffs-Appellees, v. DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services, Defendant-Appellant.	No. 09-17633 D.C. No. 3:08-cv-05173-SC MEMORANDUM* (Filed May 27, 2010)

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted May 12, 2010
San Francisco, California

Before: HUG, RYMER and McKEOWN, Circuit Judges.

David Maxwell-Jolly, the Director of the California Department of Health Care Services (Director), appeals a preliminary injunction prohibiting him

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

from implementing 10 percent Medicaid reimbursement rate reductions against Plaintiffs. The district court held that Plaintiffs demonstrated a likelihood of success on the merits that the rate reductions violate 42 U.S.C. § 1396a(a)(30)(A), which requires states to ensure that Medicaid reimbursements are consistent with "efficiency, economy, and quality of care." We affirm.

Plaintiffs have demonstrated a likelihood of success on the merits. This appeal is controlled by *California Pharmacists Association v. Maxwell-Jolly*, where we granted a motion for a stay of AB 1183's Medicaid reimbursement rate reductions. 563 F.3d 847, 849, 853 (9th Cir. 2009). Quoting the district court's order, we reasoned that "AB 1183 gives the [Department of Health Care Services] no discretion to alter the rate cuts based on the Department's own analysis, and, therefore, the cuts were not 'based on' the Department's consideration of the relevant factors, but instead constituted a post-hoc rationalization for a legislative decision that had already been made." *Id.* at 850. AB 5 similarly gives the Department of Health Care Services no discretion to alter the rate cuts at issue here.

The Director's attempts to distinguish California *Pharmacists Association* are unavailing. Even assuming the California Assembly could fulfill 42 U.S.C. § 1396a(a)(30)(A)'s procedural requirements, AB 5 does not constitute a "responsible cost stud[y]" as described by *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491, 1496 (9th Cir. 1997). The Toby Douglas declaration

concerning the California Assembly's motivation for passing AB 5 similarly fails to demonstrate that any entity conducted a cost study. **[ER at 1146-47]**

Plaintiffs will also suffer irreparable harm absent an injunction. As recognized by *California Pharmacists Association,* Plaintiffs cannot recover unlawfully withheld Medicaid reimbursements in a federal suit for damages due to California's sovereign immunity. *See* 563 F.3d at 851-52.

The district court also did not abuse its discretion in finding that the equities and public interest weigh in favor of Plaintiffs. As stated by this court in *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, "there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as the most needy in the country." 572 F.3d 644, 659 (9th Cir. 2009) (internal quotation marks omitted). The district court did not err in finding the same equities weigh in favor of Plaintiffs in this case.

Finally, the district court did not err in declining to require Plaintiffs to post a bond under Federal Rule of Civil Procedure 65(c). This court has recognized that no bond or a nominal bond may be appropriate in cases involving the public interest. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005); *Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985). The district court did not abuse its discretion

in finding Plaintiffs' action for Medicaid reimbursements falls within that class. In addition, we did not require the posting of a bond in either *Independent Living* or *California Pharmacists Association*.

The Director's remaining contentions are without merit.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SANTA ROSA MEMORIAL HOSPITAL, et al., Plaintiffs, v. DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services, Department.	Case No. 08-5173 SC **ORDER VACATING STAY OF PRELIMINARY INJUNCTION AND RESTORING PRELIMINARY INJUNCTION; STAYING CASE** (Filed Dec. 2, 2009)

On November 18, 2009, the Court granted Plaintiffs' Amended Motion for Preliminary Injunction. Docket No. 68 ("November 18, 2009 Order"). In response to Defendant's request for the Court to stay the Order pending appeal to the Ninth Circuit, Docket No. 69, the Court stayed the injunction and further proceedings in this case, Docket No. 71. Plaintiffs filed a Motion to Vacate Stay, Docket No. 77, and Defendant filed an Opposition, Docket No. 78. Upon further reflection, and upon consideration of the arguments in the parties' submissions, the Court has come to the conclusion that it should have merely stayed the case, not the injunction.

As explained in the November 18, 2009 Order, binding Ninth Circuit authority and the Court's findings of fact required the Court to preliminarily enjoin the Medi-Cal reimbursement rate reductions at issue

in this case. The Court agrees with Plaintiffs that maintaining the status quo requires enjoining the contested Medi-Cal reimbursement rate reductions. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) ("The status quo ante litem refers . . . to 'the last uncontested status which preceded the pending controversy.'") (citations omitted). Defendant does not respond to this point in its Opposition. Opp'n at 1-3.

Pursuant to Federal Rule of Civil Procedure 62(c), the Court **VACATES** its stay of the preliminary injunction and **RESTORES** the preliminary injunction. The stay of further proceedings in this case pending appeal of the November 18, 2009 Order to the Ninth Circuit remains in effect.

IT IS SO ORDERED.

Dated: December 2, 2009

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SANTA ROSA MEMORIAL HOSPITAL, et al., Plaintiffs, v. DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services, Defendant.	Case No. 08-5173 SC **ORDER STAYING PRELIMINARY INJUNCTION AND CASE** (Filed Nov. 19, 2009)

On November 18, 2009, the Court granted Plaintiffs' Amended Motion for Preliminary Injunction. Docket No. 68 ("Order"). Defendant requests the Court to stay the Order pending appeal to the Ninth Circuit. Docket No. 69. "District courts have inherent authority to stay proceedings before them." *Rohan ex rel. Gates v. Woodford,* 334 F.3d 803, 817 (9th Cir. 2003) (citing *Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936). The Court STAYS the Order and further proceedings in this case pending appeal. The Case Management Conference scheduled for November 20, 2009, is taken off calendar.

IT IS SO ORDERED.

Dated: November 19, 2009

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SANTA ROSA MEMORIAL HOSPITAL, et al.,

Plaintiffs,

v.

DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services,

Defendant.

Case No. 08-5173 SC

ORDER GRANTING AMENDED MOTION AND PRELIMINARY INJUNCTION

(Filed Nov. 18, 2009)

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' Amended Motion for Preliminary Injunction. Docket No. 60 ("Am. Mot. for Prelim. Inj."). Plaintiffs are non-contract hospitals in the State of California. *See* Docket No. 7 ("Am. Compl.") ¶ 6. Defendant David Maxwell-Jolly ("Defendant"), Director of the California Department of Health Care Services ("Department"), filed an Opposition and Plaintiffs submitted a Reply. Docket Nos. 61, 64. The Court granted Defendant's Request for Leave to file a Surreply. Docket No. 67. Ordinarily, the Court would hold a hearing to determine the appropriateness of imposing injunctive relief. However, based on the facts of this case and the case law, the Court finds that the motion is suitable for decision without oral argument. For the

reasons stated herein, Plaintiffs' Amended Motion for Preliminary Injunction is GRANTED.

II. BACKGROUND

On February 16, 2008, the California Assembly passed Assembly Bill No. 5. Docket No. 18 ("Def.'s Request for Judicial Notice") Ex. C ("AB 5").[1] AB 5 added § 14166.245 to the California Welfare & Institutions Code, which reduces the Medi-Cal reimbursement rate of hospitals not under contract with the State by ten percent. *Id.* at 21. The relevant code section states that "for acute care hospitals not under contract with the State Department of Health Care Services . . . the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent." Cal. Welfare & Inst. Code § 14166.245(b). It also provides that "[w]hen calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement . . . shall be limited to 90 percent of the hospital's audited allowable cost per day for those services. . . ." *Id.* § 14166.245(c)(3).

On November 14, 2008, Plaintiffs – all of whom are non-contract hospitals – filed a Complaint for Injunctive and Declaratory Relief seeking to enjoin these Medi-Cal reimbursement rate reductions.

---

[1] The Court GRANTS Defendant's request for the Court to take judicial notice of AB 5.

Docket No. 1 ("Compl.").[2] Plaintiffs are Santa Rosa Memorial Hospital, St. Helena Hospital, Queen of the Valley Medical Center in Napa, SRM Alliance Hospital Services (dba Petaluma Valley Hospital), Central Valley General Hospital in Hanford, San Joaquin Community Hospital in Bakersfield, Lancaster Hospital Corporation, Fountain Valley Regional Hospital and Medical Center, San Antonio Community Hospital in Upland, Children's Hospital at Mission in Mission Viejo, Mission Hospital Regional Medical Center in Mission Viejo, Saddleback Memorial Medical Center in Laguna Hills and San Clemente, Orange Coast Memorial Medical Center in Fountain Valley, Anaheim Memorial Medical Center, Hoag Memorial Hospital Presbyterian in Newport Beach, Heart Hospital of BK, LLC in Bakersfield, and John Muir Health in Concord and Walnut Creek. Am. Compl. ¶ 6.[3] On January 14, 2009, Plaintiffs moved for a preliminary injunction. Docket No. 11. On

---

[2] Plaintiffs also sought to enjoin the reimbursement reductions authorized by AB 1183, but on April 6, 2009, the Ninth Circuit stayed the rate cuts in AB 1183 pending appeal. *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009). Hence, according to Plaintiffs, the only issue to be decided by this Court is whether AB 5 should also be enjoined. Docket No. 60 ("Mem. of P&A in Supp. of Am. Mot. for Prelim. Inj.") at 1. Defendant agrees that Plaintiffs' claims concerning AB 1183 are moot because those cuts have been temporarily enjoined. *See* Opp'n at 2 n.2.

[3] According to Defendant, Fountain Valley Regional Medical Center recently converted to contract-hospital status. Opp'n at 9. If this claim is true, then the injunction granted in this Order does not apply to that hospital.

February 23, 2009, the Court stayed this case pending the Ninth Circuit's resolution of the same issues in other cases. Docket No. 30. On September 9, 2009, the Court lifted the stay and permitted Plaintiffs to file a new brief in support of an amended motion for preliminary injunction. Docket No. 59.

III. LEGAL STANDARD

To warrant injunctive relief, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, ___ U.S. ___, 129 S.Ct. 365, 374 (2008); *see also Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir.2009). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 129 S.Ct. at 376 (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

IV. DISCUSSION

Plaintiffs seek to enjoin the implementation of AB 5's ten percent reduction in the "allowable cost" reimbursement of non-contract hospitals for inpatient services they provide to Medi-Cal patients. Mem. of P&A in Supp. of Am. Not. for Prelim. Inj. at 1.

A. Likelihood of Success on the Merits

The basis of Plaintiffs' lawsuit is that the Medi-Cal reimbursement rate reductions violate federal law. Am. Compl. ¶ 2. State reimbursement plans must ensure that payments are consistent with efficiency, economy, quality of care, and access to care. *See* 42 U.S.C. § 1396a(a)(30)(A) (hereinafter § 30(A)). The Ninth Circuit interprets this federal requirement as follows:

> [T]he Director must set hospital . . . reimbursement rates that bear a reasonable relationship to efficient and economical hospitals' costs of providing quality services, unless the Department shows some justification for rates that substantially deviate from such costs. To do this, the Department must rely on responsible cost studies, its own or others', that provide reliable data as a basis for its rate setting.

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1496 (9th Cir. 1997).

The District Court for the Central District of California already determined that non-contract hospitals were likely to succeed on the merits of their claim that AB 5 conflicts with § 30(A). *Indep. Living Ctr. of S. Cal. v. Shewry,* No. 08-3315, 2008 WL 3891211, at *2-5 (C.D. Cal. Aug. 18, 2008) (hereinafter "*Indep. Living Ctr. I*"). The District Court found that:

> [Section] 30(A) creates duties on behalf of the Department, i.e., the duty to consider efficiency, economy, and quality of care when establishing reimbursement rates. . . . [W]hen the State of California seeks to modify reimbursement rates for health care services provided under the Medi-Cal program, it must consider efficiency, economy, quality of care, and equality of access, as well as the effect of providers' costs on those relevant statutory factors.

Id. at *4. The District Court noted there was no evidence the Department considered the relevant factors in making the ten percent reduction. *Id.* Instead, "AB 5 itself suggests that the only reason for imposing the cuts was California's current fiscal emergency." *Id.*

On July 9, 2009, the Ninth Circuit affirmed these determinations. *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly,* 572 F.3d 644, 651-52 (9th Cir. 2009) (hereinafter "*Indep. Living Ctr. II*").[4] The Ninth Circuit determined that:

> [I]t is clear that the Director [of the California Department of Health Care Services] violated § 30(A) when he implemented the rate reductions mandated by AB 5. The Director failed to provide any evidence that

---

[4] Mr. Maxwell-Jolly replaced Sandra Shewry as the Director of the California Department of Health Care Services on April 9, 2009. *Indep. Living Ctr. II,* 572 F.3d at 649 n.2.

> the Department or the legislature studied the impact of the ten percent rate reduction on the statutory factors of efficiency, economy, quality, and access to care prior to enacting AB 5, nor did he demonstrate that the Department considered reliable cost studies when adjusting its reimbursement rates. In the absence of such cost data, the Director could not have complied with § 30 (A). . . .

Id. at 652.

Defendant suggests that this Ninth Circuit decision involved different payment reductions than those that are currently before the Court. Opp'n at 1. However, both the District Court and the Ninth Circuit considered the rate reductions implemented by section 14166.245, which are the reductions that apply to Plaintiffs in this case. *See Indep. Living Ctr. I,* 2008 WL 3891211 at *4; *see also Indep. Living Ctr. II,* 572 F.3d at 649. The District Court found that all petitioners, including non-contract hospitals, demonstrated a likelihood of success on the merits that the ten percent rate reductions implemented by AB 5 violated federal law. *Indep. Living Ctr. I,* 2008 WL 3891211 at *4-5. The District Court also determined that most of the petitioners, but not non-contract hospitals and managed care plans, showed irreparable harm. *Id.* at *5-10. On appeal, the Ninth Circuit explicitly stated that "[u]nder the standards established in *Orthopaedic Hospital,* it is clear that the Director violated § 30(A) when he implemented the rate reductions mandated by AB 5." *Indep. Living Ctr.*

II, 572 F.3d at 652. The rate reductions that apply to non-contract hospitals in section 14166.245 of the California Welfare & Institutions Code are part of the rate reductions mandated by AB 5. Based on the Ninth Circuit's decision, the Court finds that Plaintiffs are likely to succeed on the merits of their claim that these rate reductions violate federal law.

In his Opposition, Defendant points to three documents and argues that "[w]ith these studies in mind, the Legislature expressly considered hospital costs when it drafted AB 5." Opp'n at 4.[5] The first document is the Legislative Analyst's Office ("LAO") Report analyzing the 2008-09 budget. Douglas Decl. 1 7, Ex. D ("LAO Report").[6] However, the District Court for the Central District of California has already determined that "all the Legislative Analyst's report shows is that such a report was prepared. Respondent has not shown that the Legislature ever reviewed or considered the concerns raised therein." *Indep. Living Ctr. I*, 2008 WL 3891211 at *4 n. 10. Similarly, here,

---

[5] This statement in Defendant's Opposition directly contradicts the statement in Defendant's Surreply that "Plaintiffs argue for the first time in their reply brief that the Legislature (not DHCS) has the duty to study proposed Medi-Cal reimbursement rates and provider costs before they are enacted." *See* Surreply at 2. It is Defendant who argued that the Legislature expressly considered hospital costs when it drafted AB 5. *See* Opp'n at 4.

[6] Toby Douglas, Chief Deputy Director for health programs at the California Department of Health Care Services, filed a declaration in support of Defendant's July 17, 2009 Supplemental Brief. Docket No. 49.1.

Defendant has presented no evidence that the Legislature or the Department ever reviewed or considered this report prior to setting the rate reductions that apply to Plaintiffs. Indeed, nowhere in the LAO Report is there any analysis of non-contract hospital costs. *See* LAO Report.

The second document is the 2007 California Medical Assistance Commission ("CMAC") Annual Report. Douglas Decl. Ex. C ("CMAC Annual Report 2007"). The Court finds that this report is irrelevant. CMAC is the agency established for negotiating contracts with managed care plans and hospitals under the Medi-Cal program. *Id.* at 1. The report exclusively concerns contract hospitals, not the non-contract hospitals who are Plaintiffs in this case. *See id.* at 1-22. Douglas declares that "[t]he 2007 CMAC report would have been the most recent annual report available for the Legislature to review when it enacted AB 5." Douglas Decl. ¶ 6. Defendant presents no evidence that the Department or the Legislature actually considered the report before setting the ten percent reimbursement rate reduction at issue in this case.

The third document is a November 2005 analysis by the Department concerning a similar reimbursement rate reduction in 2004-2005. Douglas Decl. Ex. B ("November 2005 Analysis"). The Douglas Declaration states that "[t]he November 2005 DHCS Rate Analysis was a public document that would have been available for legislators to review." *Id.* ¶ 5. Defendant presented no evidence that the Department or the

Legislature actually reviewed it. Even if they did, this document does not consider the impact of AB 5 on non-contract hospital costs. *See* November 2005 Analysis.

Defendant contends that the Department used the four-month period between the enactment and implementation of AB 5 to determine whether the reimbursement reductions satisfied the requirements of § 30(A). Opp'n at 5-8. The Court finds that the evidence presented is not sufficient to support this contention. William Liu declares that the Department conducted an analysis of the impact of section 14166.245 prior to its implementation. Liu Decl. ¶ 4.[7] However, the document submitted to support this claim merely consists of annual estimates of recoupment collected by the PIRL program and percentages of total reimbursement for non-contract hospitals between 1999 and 2005.[8] This document does not support the contention that the Director relied on

---

[7] William Liu, Chief of the Disproportionate Share Hospital Financing and Non-Contract Hospital Recoupment Section, Safety Net Financing Division, of the California Department of Health Care Services, filed a declaration in support of the Opposition. Docket No. 61-2.

[8] "PIRL" stands for peer grouping inpatient reimbursement limitation. Final Medi-Cal reimbursement for non-contract hospital inpatient services is normally established at the PIRL, which is the lesser of a hospital's (1) customary charges, (2) allowable costs determined by the Department, (3) an all-inclusive rate per discharge limitation, or (4) peer grouping rate per discharge limiation [sic]. Liu Decl. ¶ 2.

responsible cost studies when adjusting the reimbursement rates at issue to determine whether these reimbursement rate reductions were consistent with efficiency, economy, quality of care, and access.

Gary Wong also declares that the Department analyzed whether the reduced reimbursement payments would be reasonable relative to hospitals' costs prior to implementation. Wong Decl. ¶ 5.[9] However, Wong supports his claim by pointing to only two documents. The first is the November 2005 Analysis that the Court has already found inadequate to show that the Department complied with its statutory obligations. *See* Wong Decl. Ex. A. The second is a one-page, handwritten, summary comparison of how audited allowable costs compared to reported costs for unidentified non-contract hospitals between 2002 and 2005. *See id.* Ex. B. This document is clearly inadequate to show the Department relied on responsible cost studies to determine that the ten percent reduction was consistent with efficiency, economy, quality of care, and access. The Court finds the Liu and Wong declarations and attached exhibits are not sufficient to show the Department complied with federal requirements.

---

[9] Gary Wong, formerly employed as Health Program Audit Manager 1 in the Financial Audits Branch, Audits and Investigations Program, of the California Department of Health Care Services filed a declaration in support of Defendant's Opposition. Docket No. 61-4. *See also* Docket 17.5 ("Douglas Decl.") Ex. A Attachment E.

Furthermore, it is clear that the sole motivation for AB 5 was budgetary. The relevant code section begins by stating that "[t]he Legislature finds and declares that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures. . . ." Cal. Welfare & Inst. Code § 14166.245(a). The Ninth Circuit has already determined that the record supported the District Court's determination that the Medi-Cal reimbursement rate reductions contained in AB 5 were based solely on state budgetary concerns. *Indep. Living Ctr. II,* 572 F.3d at 656. For this reason alone, the Court finds that AB 5 violates federal law. *Id.* Based on all of the foregoing, the Court concludes Plaintiffs have shown a likelihood of success on the merits.

B. Irreparable Harm

Dr. Michael L. Vaida declares that collectively Plaintiffs will lose over $13 million per year as a result of the AB 5 rate cuts. Johnson Decl. Ex. 5 ("Vaida Decl.").[10] Defendant objects to Dr. Vaida's declaration and requests that it be stricken. Docket No. 63 ("Def.'s Renewed Objections"). The Court may consider inadmissible evidence on a motion for preliminary injunction so long as the Court gives such

---

[10] Dean L. Johnson, attorney for Plaintiffs, filed a Declaration in Support of the Amended Motion for Preliminary Injunction. Dr. Vaida's declaration, which was previously filed in in this case as Docket No. 48, pp. 62-65, is attached as Exhibit 5 to Johnson's Declaration.

evidence appropriate weight. *See Indep. Living Ctr. I,* 2008 WL 3891211 at *2 n.5. The Court therefore OVERRULES Defendant's objection to Dr. Vaida's declaration and DENIES the request that it be stricken.

However, even if the Court did not accept Dr. Vaida's calculation of the non-contract hospitals' losses, there can be no dispute that the ten percent reimbursement rate reductions implemented by AB 5 will result in monetary losses for Plaintiffs. Defendant provides data indicating the reduction will result in decreased revenues for Plaintiffs of between 0.1% and 4.2%, depending on the hospital. *See* Opp'n at 9-10.

Ordinarily, monetary losses do not constitute irreparable harm. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1202 (9th Cir. 1980). However, the Ninth Circuit recently determined that reductions in Medi-Cal revenue payments to hospitals constitute irreparable harm if a requested injunction is not granted because the Eleventh Amendment sovereign immunity of the Department bars hospitals from ever recovering damages in federal court against the Department if they are successful on the merits of their case. *Cal. Pharm. Ass'n v. Maxwell-Jolly,* 563 F.3d 847, 850-52 (9th Cir.

2009).[11] Accordingly, the Court finds that Plaintiffs have shown irreparable harm.

Defendant accuses Plaintiffs of waiting too long to seek a preliminary injunction and, as a result, Defendant claims that Plaintiffs are not entitled to a finding of irreparable harm. Opp'n at 8-9, 21. Here, however, the Court stayed this case pending the Ninth Circuit's resolution of the same issues in other cases. *See* Docket No. 30. Now that the Ninth Circuit has clarified the standard of irreparable harm that applies in a case where health care providers are challenging Medi-Cal reimbursement rate reductions, the Court finds that Plaintiffs have shown irreparable harm as a result of the ten percent rate reduction.

---

[11] The Ninth Circuit's articulation of the irreparable harm standard in *Californa* [sic] *Pharmacists Association* was made in the context of deciding whether to issue a stay of Medi-Cal reimbursement rate cuts that the District Court had declined to enjoin. 563 F.3d at 849-50. The four factors considered by the Ninth Circuit are the same as the four factors a District Court must consider when ruling on a motion for a preliminary injunction. *See id.* Furthermore, both a stay of a state action pending appeal and granting a preliminary injunction in this context produce the same result: both temporarily enjoin Medi-Cal rate reimbursement reductions. Hence, the Court adopts the standard of irreparable harm articulated by the Ninth Circuit in *Californa* [sic] *Pharmacists Association*.

C. Balance of Equities and Public Interest

Defendant points out that California's fiscal situation remains precarious. Opp'n at 22. The Court is mindful of the budgetary difficulties facing the State of California. However, the Ninth Circuit has already held with respect to AB 5 that "[s]tate budgetary considerations do not . . . in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief. In contrast, there is a robust public interest in safeguarding access to health care for those eligible for Medicaid." *Indep. Living Ctr. II,* 572 F.3d at 659. Based on these considerations, the Ninth Circuit determined the District Court did not abuse its discretion in concluding that the balance of hardships and public interest weighed in favor of enjoining implementation of the ten percent rate reduction required by AB 5. *Id.*

Here, an AB 5 rate reduction is also before the Court, and therefore the same considerations apply. While, as Defendant points out, "an injunction would require policymakers to revisit possible program cuts," Opp'n at 22, the Court must also take into consideration the threat to the health of Medi-Cal recipients created by a reduction in non-contract hospital reimbursement rates, and the public interest in ensuring access to health care. The Ninth Circuit has already determined that "it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law."

Cal. Pharm. Ass'n, 563 F.3d at 852-53. The Court finds that the balance of equities and the public interest weigh in favor of granting the injunction.

V. CONCLUSION

For the reasons stated above, the Court GRANTS the Amended Motion for Preliminary Injunction. It is hereby ORDERED that, as of the date set forth below, Defendant Maxwell-Jolly, Director of the California Department of Health Care Services, is preliminarily enjoined from continuing to implement and apply the ten percent reduction in the "allowable cost" reimbursement of the Plaintiffs for the inpatient services they provide to Medi-Cal patients.

The Case Management Conference set for Friday, November 20, 2009, remains on calendar. The parties shall appear at 10:00 a.m. in Courtroom 1, on the 17th floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

IT IS SO ORDERED.

Dated: November 18, 2009

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

California Welfare and Institutions Code

(Effective February 16, 2008 to September 29, 2008)

§ 14166.245. Legislative findings and declarations regarding fiscal crisis; reduction of specified payments and reimbursement amounts; exemptions; implementation

(a) The Legislature finds and declares that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California.

(b) Notwithstanding any other provision of law, for acute care hospitals not under contract with the State Department of Health Care Services pursuant to Article 2.6 (commencing with Section 14081) of Chapter 7 of Part 3 of Division 9, the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent.

(c)(1) Notwithstanding any other provision of law, for acute care hospitals not under contract with the State Department of Health Care Services, the reimbursement amount for inpatient services provided to Medi-Cal recipients for dates of service on and after July 1, 2008, shall not exceed the amount determined pursuant to paragraph (3).

(2) For purposes of this subdivision, the reimbursement for inpatient services includes the amounts paid for all categories of inpatient services allowable by Medi-Cal. The reimbursement includes the amounts paid for routine services, together with all related ancillary services.

(3) When calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement for dates of service on and after July 1, 2008, shall be limited to 90 percent of the hospital's audited allowable cost per day for those services multiplied by the number of Medi-Cal covered inpatient days in the hospital's fiscal year on or after July 1, 2008.

(d) Hospitals that participate in the Selective Provider Contracting Program pursuant to Article 2.6 (commencing with Section 14081) and designated public hospitals under Section 14166.1, except Los Angeles County Martin Luther King, Jr./Charles R. Drew Medical Center and Tuolumne General Hospital, shall be exempt from the 10 percent reduction required by this section.

(e) Notwithstanding the rulemaking provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the director may implement subdivision (b) by means of a provider bulletin, or other similar instruction, without taking regulatory action.

(f) The director shall promptly seek all necessary federal approvals in order to implement this section, including necessary amendments to the state plan.

California Welfare and Institutions Code

(Effective September 30, 2008 to July 27, 2009)

§ 14166.245. Legislative findings and declarations regarding fiscal crisis; reduction of specified payments and reimbursement amounts; exemptions; implementation

<Section operative until Jan. 1, 2013. See, also, section operative Jan. 1, 2013.>

(a) The Legislature finds and declares that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California.

(b)(1) Notwithstanding any other provision of law, except as provided in Article 2.93 (commencing with Section 14091.3), for hospitals that receive Medi-Cal reimbursement from the State Department of Health Care Services and that are not under contract with the State Department of Health Care Services pursuant to Article 2.6 (commencing with Section 14081) of Chapter 7 of Part 3 of Division 9, the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent.

(2)(A) Beginning on October 1, 2008, amounts paid that are calculated pursuant to paragraph (1) shall not exceed the applicable regional average per diem

contract rate for tertiary hospitals and for all other hospitals established as specified in subparagraph (C), reduced by 5 percent, multiplied by the number of Medi-Cal covered inpatient days for which the interim payment is being made.

(B) This paragraph shall not apply to small and rural hospitals specified in Section 124840 of the Health and Safety Code, or to hospitals in open health facility planning areas that were open health facility planning areas on October 1, 2008, unless either of the following apply:

(i) The open health facility planning area at any time on or after July 1, 2005, was a closed health facility planning area as determined by the California Medical Assistance Commission.

(ii) The open health facility planning area has three or more hospitals with licensed general acute care beds.

(C)(i) For purposes of this subdivision and subdivision (c), the average regional per diem contract rates shall be derived from unweighted average contract per diem rates that are publicly available on June 1 of each year, trended forward based on the trends in the California Medical Assistance Commission's Annual Report to the Legislature. For tertiary hospitals, and for all other hospitals, the regional average per diem contract rates shall be based on the geographic regions in the California Medical Assistance Commission's Annual Report to the Legislature. The applicable average regional per

diem contract rates for tertiary hospitals and for all other hospitals shall be published by the department on or before October 1, 2008, and these rates shall be updated annually for each state fiscal year and shall become effective each July 1, thereafter. Supplemental payments shall not be included in this calculation.

(ii) For purposes of clause (i), both the federal and nonfederal share of the designated public hospital cost-based rates shall be included in the determination of the average contract rates by multiplying the hospital's interim rate, established pursuant to Section 14166.4 and that is in effect on June 1 of each year, by two.

(iii) For the purposes of this section, a tertiary hospital is a children's hospital specified in Section 10727, or a hospital that has been designated as a Level I or Level II trauma center by the Emergency Medical Services Authority established pursuant to Section 1797.1 of the Health and Safety Code.

(D) For purposes of this section, the terms "open health facility planning area" and "closed health facility planning area" shall have the same meaning and be applied in the same manner as used by the California Medical Assistance Commission in the implementation of the hospital contracting program authorized in Article 2.6 (commencing with Section 14081).

(c)(1) Notwithstanding any other provision of law, for hospitals that receive Medi-Cal reimbursement from the State Department of Health Care Services

and that are not under contract with the State Department of Health Care Services, pursuant to Article 2.6 (commencing with Section 14081), the reimbursement amount paid by the department for inpatient services provided to Medi-Cal recipients for dates of service on and after July 1, 2008, shall not exceed the amount determined pursuant to paragraph (3).

(2) For purposes of this subdivision, the reimbursement for inpatient services includes the amounts paid for all categories of inpatient services allowable by Medi-Cal. The reimbursement includes the amounts paid for routine services, together with all related ancillary services.

(3) When calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement for dates of service on and after July 1, 2008, shall be limited to the lesser of the following:

(A) Ninety percent of the hospital's audited allowable cost per day for those services multiplied by the number of Medi-Cal covered inpatient days in the hospital's fiscal year on or after July 1, 2008.

(B) Beginning for dates of service on and after October 1, 2008, the applicable average regional per diem contract rate established as specified in subparagraph (A) of paragraph (2) of subdivision (b), reduced by 5 percent, multiplied by the number of Medi-Cal covered inpatient days in the hospital's fiscal year, or portion thereof. This subparagraph

shall not apply to small and rural hospitals specified in Section 124840 of the Health and Safety Code, or to hospitals in open health facility planning areas that were open health facility planning areas on July 1, 2008, unless either of the following apply:

(i) The open health facility planning area at any time on or after July 1, 2005, was a closed health facility planning area as determined by the California Medical Assistance Commission.

(ii) The open health facility planning area has more than three hospitals with licensed general acute care beds.

(d) Except as provided in Article 2.93 (commencing with Section 14091.3), hospitals that participate in the Selective Provider Contracting Program pursuant to Article 2.6 (commencing with Section 14081) and designated public hospitals under Section 14166.1, except Los Angeles County Martin Luther King, Jr./Charles R. Drew Medical Center and Tuolumne General Hospital, shall be exempt from the limitations required by this section.

(e) Notwithstanding the rulemaking provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the director may implement and administer this section by means of provider bulletins, or other similar instructions, without taking regulatory action.

(f) The director shall promptly seek all necessary federal approvals in order to implement this section, including necessary amendments to the state plan.

(g) Notwithstanding any other provision of this section, small and rural hospitals, as defined in Section 124840 of the Health and Safety Code, shall be exempt from the payment reductions set forth in this section for dates of service on and after November 1, 2008.

(h) For hospitals that are subject to clauses (i) and (ii) of subparagraph (B) of paragraph (2) of subdivision (b) and that choose to contract pursuant to Article 2.6 (commencing with Section 14081), the California Medical Assistance Commission shall negotiate rates taking into account factors specified in Section 14083.

(i)(1) In January 2010 and in January 2011, the department and the California Medical Assistance Commission shall submit a written report to the policy and fiscal committees of the Legislature on the implementation and impact of the changes made by this section, including, but not limited to, the impact of those changes on the number of hospitals that are contract and noncontract, patient access, and cost savings to the state.

(2) On or before January 1, 2012, the department, in consultation with the California Medical Assistance Commission, shall report on the implementation of this section. The report shall include, but not be limited to, information and analyses addressing

patient access, capacity and needs within the health facility planning area, reimbursement of hospital costs, changes in the number of open and closed health facility planning areas, the impact of this section on the extent of hospital contracting, and fiscal impact on the state.

(j) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

California Welfare and Institutions Code

(Effective July 28, 2009 to January 1, 2013)

§ 14166.245. Legislative findings and declarations regarding fiscal crisis; reduction of specified payments and reimbursement amounts; exemptions; implementation

<Section operative until Jan. 1, 2013. See, also, section operative Jan. 1, 2013.>

(a) The Legislature finds and declares that the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California.

(b)(1) Notwithstanding any other provision of law, except as provided in Article 2.93 (commencing with Section 14091.3), for hospitals that receive Medi-Cal reimbursement from the State Department of Health Care Services and that are not under contract with the State Department of Health Care Services pursuant to Article 2.6 (commencing with Section 14081) of Chapter 7 of Part 3 of Division 9, the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent.

(2)(A) Beginning on October 1, 2008, amounts paid that are calculated pursuant to paragraph (1) shall not exceed the applicable regional average per diem contract rate for tertiary hospitals and for all other

hospitals established as specified in subparagraph (C), reduced by 5 percent, multiplied by the number of Medi-Cal covered inpatient days for which the interim payment is being made.

(B) This paragraph shall not apply to small and rural hospitals specified in Section 124840 of the Health and Safety Code, or to hospitals in open health facility planning areas that were open health facility planning areas on October 1, 2008, unless either of the following apply:

(i) The open health facility planning area at any time on or after July 1, 2005, was a closed health facility planning area as determined by the California Medical Assistance Commission.

(ii) The open health facility planning area has three or more hospitals with licensed general acute care beds. State-owned or operated hospitals shall not be included in determining whether this clause shall apply.

(C)(i) For purposes of this subdivision and subdivision (c), the average regional per diem contract rates shall be derived from unweighted average contract per diem rates that are publicly available on June 1 of each year, trended forward based on the trends in the California Medical Assistance Commission's Annual Report to the Legislature. For tertiary hospitals, and for all other hospitals, the regional average per diem contract rates shall be based on the geographic regions in the California Medical Assistance Commission's Annual Report to the Legislature.

from the State Department of Health Care Services and that are not under contract with the State Department of Health Care Services, pursuant to Article 2.6 (commencing with Section 14081), the reimbursement amount paid by the department for inpatient services provided to Medi-Cal recipients for dates of service on and after July 1, 2008, shall not exceed the amount determined pursuant to paragraph (3).

(2) For purposes of this subdivision, the reimbursement for inpatient services includes the amounts paid for all categories of inpatient services allowable by Medi-Cal. The reimbursement includes the amounts paid for routine services, together with all related ancillary services.

(3) When calculating a hospital's cost report settlement for a hospital's fiscal period that includes any dates of service on and after July 1, 2008, the settlement for dates of service on and after July 1, 2008, shall be limited to the lesser of the following:

(A) Ninety percent of the hospital's audited allowable cost per day for those services multiplied by the number of Medi-Cal covered inpatient days in the hospital's fiscal year on or after July 1, 2008.

(B) Beginning for dates of service on and after October 1, 2008, the applicable average regional per diem contract rate established as specified in subparagraph (A) of paragraph (2) of subdivision (b), reduced by 5 percent, multiplied by the number of Medi-Cal covered inpatient days in the hospital's

fiscal year, or portion thereof. This subparagraph shall not apply to small and rural hospitals specified in Section 124840 of the Health and Safety Code, or to hospitals in open health facility planning areas that were open health facility planning areas on July 1, 2008, unless either of the following apply:

(i) The open health facility planning area at any time on or after July 1, 2005, was a closed health facility planning area as determined by the California Medical Assistance Commission.

(ii) The open health facility planning area has three or more hospitals with licensed general acute care beds. State-owned or operated hospitals shall not be included in determining whether this clause shall apply.

(d) Except as provided in Article 2.93 (commencing with Section 14091.3), hospitals that participate in the Selective Provider Contracting Program pursuant to Article 2.6 (commencing with Section 14081) and designated public hospitals under Section 14166.1, except Los Angeles County Martin Luther King, Jr./Charles R. Drew Medical Center and Tuolumne General Hospital, shall be exempt from the limitations required by this section.

(e) Notwithstanding the rulemaking provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the director may implement and administer this section by means of provider bulletins, or other similar instructions, without taking regulatory action.

(f) The director shall promptly seek all necessary federal approvals in order to implement this section, including necessary amendments to the state plan.

(g)(1) Notwithstanding any other provision of this section, small and rural hospitals, as defined in Section 124840 of the Health and Safety Code, shall be exempt from the payment reductions set forth in this section for dates of service on and after November 1, 2008, through and including June 30, 2009. On and after July 1, 2009, small and rural hospitals as defined in this paragraph shall be subject to the reductions set forth in paragraph (1) of subdivision (b) and subparagraph (A) of paragraph (3) of subdivision (c), but shall be exempt from the provisions of subparagraph (A) of paragraph (2) of subdivision (b) and subparagraph (B) of paragraph (3) of subdivision (c).

(2) Notwithstanding any other provision of this section, hospitals that are certified by Medicare as Medical Critical Access Providers or as Rural Referral Centers shall be exempt from the payment reductions set forth in this section for dates of service on and after July 1, 2009.

(h) For hospitals that are subject to clauses (i) and (ii) of subparagraph (B) of paragraph (2) of subdivision (b) and that choose to contract pursuant to Article 2.6 (commencing with Section 14081), the California Medical Assistance Commission shall negotiate rates taking into account factors specified in Section 14083.

(i)(1) In January 2010 and in January 2011, the department and the California Medical Assistance Commission shall submit a written report to the policy and fiscal committees of the Legislature on the implementation and impact of the changes made by this section, including, but not limited to, the impact of those changes on the number of hospitals that are contract and noncontract, patient access, and cost savings to the state.

(2) On or before January 1, 2012, the department, in consultation with the California Medical Assistance Commission, shall report on the implementation of this section. The report shall include, but not be limited to, information and analyses addressing patient access, capacity and needs within the health facility planning area, reimbursement of hospital costs, changes in the number of open and closed health facility planning areas, the impact of this section on the extent of hospital contracting, and fiscal impact on the state.

(j) This section shall remain in effect only until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date.

RECEIVED
AND
FILED

No. 10-283

In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director, California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL S. SORGEN, ESQ.
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton St., Ninth Floor
San Francisco, CA 94108
Telephone: (415) 956-1360
Facsimile: (415) 956-6342
Email: msorgen@sorgen.net

DEAN L. JOHNSON, ESQ.*
DEAN L. JOHNSON, INC.
6863 Tanzanite Dr.
Carlsbad, CA 92009
Telephone: (760) 603-0022
Facsimile: (866) 373-9348
Email:
deanl.johnson@gmail.com

**Counsel of Record*

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Whether those injured by a state law may maintain an action in federal court to enjoin a state official from enforcing that law on the ground that it is preempted by a federal law.

2. Whether a state law reducing Medicaid reimbursement rates is preempted by the federal law governing such rate-setting, 42 U.S.C. § 1396a(a)(30)(A).

CORPORATE DISCLOSURE STATEMENT

CHILDREN'S HOSPITAL AT MISSION, a California corporation, dba CHOC Children's at Mission, has no parent corporation, and no publicly-held company owns any stock in the above-named respondent.

FOUNTAIN VALLEY REGIONAL HOSPITAL AND MEDICAL CENTER, a California corporation, is 100% owned by OrNda Hospital Corporation, a California corporation that is 100% owned by Tenet HealthSystem HealthCorp, a Delaware corporation that is 100% owned by Tenet Healthcare Corporation (NYSE: THC), a publicly-held Nevada corporation. As of June 30, 2010, only one company reported to the Securities and Exchange Commission that it beneficially owned more than 10% of Tenet Healthcare Corporation's publicly traded common stock: Franklin Mutual Advisers, LLC (10.6%), which is not itself a publicly-held company, but is a subsidiary of a publicly-held company, Franklin Resources Inc. (NYSE: BEN).

HEART HOSPITAL OF BK, LLC, a North Carolina limited liability company, dba Bakersfield Heart Hospital, is owned by Heart Hospital of BK, LLC (the "Company"), a North Carolina limited liability company. As of September 30, 2008, HHBF, Inc., an indirectly owned subsidiary of MedCath Corporation ("MedCath"), held a 53.3% interest in the Company, and the physician members held the remaining 46.7% interest. MedCath is publicly traded on the NASDAQ under the symbol "MDTH."

CORPORATE DISCLOSURE STATEMENT – Continued

HOAG MEMORIAL HOSPITAL PRESBYTERIAN, a California corporation, dba Hoag Memorial Hospital Presbyterian in Newport Beach, has no parent corporation, and no publicly-held company owns any stock in the above-named respondent.

JOHN MUIR HEALTH, a California corporation, dba John Muir Medical Center – Concord Campus and as John Muir Medical Center – Walnut Creek Campus, has no parent corporation, and no publicly-held company owns any stock in the above-named respondent.

LANCASTER HOSPITAL CORPORATION, a California corporation, dba Lancaster Community Hospital, is owned by Universal Health Services of Palmdale, Inc., which is not a publicly traded company. The stock of Universal Health Services of Palmdale, Inc. is wholly owned by Universal Health Services, Inc., which is a publicly traded company. There are no publicly-held companies that own more than 10% of the stock of Universal Health Services, Inc.

ORANGE COAST MEMORIAL MEDICAL CENTER, a California corporation, ANAHEIM MEMORIAL MEDICAL CENTER, a California corporation, and SADDLEBACK MEMORIAL MEDICAL CENTER, a California corporation, have as a parent

CORPORATE DISCLOSURE STATEMENT – Continued

corporation MEMORIAL HEALTH SERVICES, a California corporation. No publicly-held company owns any stock in the above-named respondents or parent corporation.

SAN ANTONIO COMMUNITY HOSPITAL, a California corporation, has no parent corporation, and no publicly-held company owns any stock in the above-named respondent.

SANTA ROSA MEMORIAL HOSPITAL, SRM ALLIANCE HOSPITAL SERVICES, a California corporation, dba Petaluma Valley Hospital, QUEEN OF THE VALLEY MEDICAL CENTER, a California corporation, and MISSION HOSPITAL REGIONAL MEDICAL CENTER, a California corporation, dba Mission Hospital, are all non-profit corporations. No publicly-held company owns any stock in the above-named respondents.

ST. HELENA HOSPITAL, a California corporation, CENTRAL VALLEY GENERAL HOSPITAL, a California corporation, and SAN JOAQUIN COMMUNITY HOSPITAL, a California corporation, have as a parent corporation ADVENTIST HEALTH SYSTEMS/WEST, a California corporation. No publicly-held company owns any stock in the above-named respondents or parent corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

INTRODUCTION 1

STATEMENT 2

A. Statutory Framework 2

B. Factual Background 4

REASONS THE PETITION SHOULD BE DENIED 8

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE THE DECISIONS BELOW ARE A CORRECT APPLICATION OF THIS COURT'S SETTLED SUPREMACY CLAUSE JURISPRUDENCE 8

A. The Courts Do Not Require That Preemption Claims Meet The Same Standards As Claims Under Section 1983 8

B. A Supremacy Clause Claim Does Not Depend On A Private Right Of Action 11

C. The Committee Reports Relating To The Boren Amendment Are Irrelevant 12

TABLE OF CONTENTS – Continued

Page

D. Over Half Of The Medicaid Expenditures In California Are Paid For With Federal Dollars 13

E. There Is A Dearth Of Successful Supremacy Clause Cases Outside Of California 14

F. The Courts Of Appeals Have Uniformly Reached The Same Conclusion As The Court Below 15

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION BECAUSE THE DECISIONS BELOW ARE A CORRECT APPLICATION OF FEDERAL LAW 18

A. The Court Of Appeals Correctly Applied 42 U.S.C. § 1396a(a)(30)(A) 18

B. The Federal CMS Has Embraced The Ninth Circuit Analysis Of 42 U.S.C. § 1396a(a)(30)(A) 21

C. The District Court Expressly Considered The Evidence Presented By The Petitioner And Correctly Rejected It 22

D. The Decision Below Is Consistent With The Other Circuits 25

III. THIS CASE IS A POOR VEHICLE FOR THE COURT'S REVIEW 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Health & Soc. Servs. v. Centers for Medicare & Medicaid Servs., 424 F.3d 931 (9th Cir. 2005) 12, 21

Alexander v. Sandoval, 532 U.S. 275 (2001) 11

American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U.S. 372 (1893) 28

Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006) 17

Arkansas Med. Soc'y, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 12, 26

BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 317 F.3d 1270 (11th Cir. 2003) 17

Blum v. Bacon, 457 U.S. 132 (1982) 18

Cal. Ass'n of Health Facilities v. Department of Health Servs., No. A107551, 2006 WL 3775842 (Cal. Ct. App. Dec. 26, 2006) 31

Cal. Ass'n for Health Servs. at Home v. Department of Health Servs., 148 Cal.App.4th 696 (2007) 31

Cal. Hospital Ass'n v. Maxwell-Jolly, 2010 WL 3280274 (Cal. App. 1 Dist.) (2010) 30

Cal. Pharm. Ass'n v. Maxwell-Jolly, 563 F.3d 847 (9th Cir. 2009) 3, 5, 7, 10, 20

Cal. Pharm. Ass'n v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010) 20, 25, 26

TABLE OF AUTHORITIES – Continued

Page

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 9

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 10

Cort v. Ash, 422 U.S. 66 (1975) 11

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) 11

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 18

Dalton v. Little Rock Family Planning Services, 516 U.S. 474 (1996) (per curiam) 18

Doe v. Chao, 540 U.S. 614 (2004) 13

Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697 (5th Cir. 2007) 27

Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 27

Exeter Mem'l Hosp. Ass'n v. Belshe, 145 F.3d 1106 (9th Cir. 1998) 29

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 10

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) 9

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 10, 11

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 28

TABLE OF AUTHORITIES – Continued

Page

Indep. Living Ctr. of Southern Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644 (9th Cir. July 9, 2009) 6, 14, 15

Indep. Living Ctr. of Southern Cal., Inc. v. Shewry, 2008 U.S. Dist. LEXIS 77525 (2008) 5, 14, 15, 22

Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) 9, 18

Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640 (11th Cir. 1990) 16, 17

Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) 27

Methodist Hospitals, Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 12, 27

Minn. Homecare Ass'n, Inc. v. Gomez, 108 F.3d 917 (8th Cir. 1997) 26

Mission Hosp. Reg'l Med. Ctr. v. Shewry, 168 Cal.App.4th 460 (2008) 30

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 30

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997) 12

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 10

Pennsylvania Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423 (3d Cir. 2000) 18

TABLE OF AUTHORITIES – Continued

Page

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 17

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 9

Rite Aid of Pennsylvania, Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) 26, 27

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 8, 9

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635 (2002) 11

Visiting Nurse Ass'n of North Shore, Inc. v. Bullen, 93 F.3d 997 (1st Cir. 1996) 12

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) 13

STATUTES

42 U.S.C. § 1396a(a)(13)(A) 12

42 U.S.C. § 1396a(a)(30)(A) ..... *passim*

42 U.S.C. § 1983 ..... 8, 10, 27

42 U.S.C. § 1988 10

RULES AND REGULATIONS

22 California Code of Regulations §§ 51545-51555 2

22 California Code of Regulations §§ 51545(a)(30) and 51545(a)(70) 3

TABLE OF AUTHORITIES – Continued

Page

Cal. Code of Civil Procedure § 1085 ..... 2, 30

Cal. Welf. & Inst. Code § 14166.245 3

OTHER AUTHORITIES

American Recovery and Reinvestment Act of 2009 (hereinafter "*ARRA*"), Pub. L. No. 111-5, 123 Stat. 115 ..... 13, 14

Black's Law Dictionary (6th ed. 1990) 19

H.R. Rep. No. 105-149, at 591 (1997) 13

Kaiser Commission on Medicaid and the Uninsured, *American Recovery and Reinvestment Act (AARA): Medicaid and Health Care Provisions* (Mar. 2009), at http://www.kff.org/medicaid/upload/7872.pdf 14

Letter from Timothy Westmoreland, Director, Health Care Finance Administration, U.S. Dep't of Health & Human Servs., to State Medicaid Directors, at 1 (Jan. 2, 2001), at http://www.cms.hhs.gov/smdl/downloads/smd010201.pdf (last visited October 9, 2010) 30

INTRODUCTION

There are no grounds for review here.[1] This case involves no conflict between the decisions of Federal courts of different circuits. Moreover, the Ninth Circuit's application of 42 U.S.C. § 1396a(a)(30)(A) is consistent with its plain terms and the interpretation of that statute by the federal CMS (Centers for Medicare & Medicaid Services).

Even if legitimate grounds for certiorari existed, this case would be a poor vehicle for review for at least three reasons. First, the decision that the petitioner seeks to have reviewed is based on a preliminary injunction, and not a final action. Review of such interlocutory decisions is strongly disfavored. Second, the rate change at issue here has not been approved, and may never be approved, by the federal CMS. Administrative disapproval of petitioner's rate change would make the decision of this Court moot. Third, this Court does not grant review in cases where a reversal would not change the position of the parties in some concrete fashion. In the instant action, a reversal would not change the ultimate outcome of the case because respondents can pursue

---

[1] Respondents agree with petitioner that this case involves "substantially the same legal issues as the petitions for certiorari pending in *Maxwell-Jolly v. Independent Living Center of Southern California*, No. 09-958. . .and *Maxwell-Jolly v. California Pharmacists Association*, No. 09-1158[.]" Pet. 3. For the reasons set forth herein, and in the other cases, the petitions in all of these cases should be denied.

their claims in State court under a writ of mandate (Cal. Code of Civil Procedure § 1085).

STATEMENT

A. Statutory Framework

The State pays California hospitals for the inpatient services they provide to Medi-Cal beneficiaries in one of two ways. Under one approach, the California Medical Assistance Commission ("CMAC") negotiates contracts with selected hospitals. This system of reimbursement is known as the selective provider contracting program, and the hospitals that participate in it are called "contracting" hospitals. The State of California did not reduce the negotiated rates paid contract hospitals; hence, those types of facilities are not relevant to this lawsuit. Pet. App. 25.

Hospitals that do not have a contract are typically referred to as "noncontract" hospitals. For over twenty-five years (from 1982 through 2008), the State paid noncontract hospitals based on their "allowable costs," and then applied two different and highly sophisticated measures of "economy" and "efficiency" to those costs, the rate per discharge limit and the peer group limit. *See* App., *infra*, 1-85; 22 California Code of Regulations (C.C.R.) §§ 51545-51555. If a hospital's "allowable costs" fell below the rate per discharge limit and the peer group limit, then those costs were fully reimbursed as the costs of an "[e]conomically and [e]fficiently [o]perated" provider

of inpatient services. *See* App., *infra*, 5, 12-13; 22 C.C.R. §§ 51545(a)(30) and 51545(a)(70). This approach – which was based on sophisticated measures of "economy" and "efficiency" – had been approved by the federal CMS as complying with federal law.

In 2008, without federal approval, the State completely abandoned the sophisticated reimbursement methodology described above. On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 (AB 5) in special session which, effective July 1, 2008, imposed an across-the-board ten percent reduction in the "allowable cost" reimbursement of *all* noncontract hospitals for the inpatient services they provide Medi-Cal recipients. Cal. Welf. & Inst. Code § 14166.245 (Pet. App. 25-41). Then, effective October 1, 2008, California enacted AB 1183 which further cut the amounts paid to noncontract hospitals to the lesser of the above-described 10% reduction or to the applicable CMAC average contract rate less 5 percent.[2] Cal. Welf. & Inst. Code § 14166.245 (Pet. App. 25-41).

Respondents showed that without an injunction of both AB 5 and AB 1183 they would have lost between 21% and 37% of their inpatient Medi-Cal reimbursement, which translated into an annual loss

---

[2] In the instant case, respondents sought to enjoin only the rate cut under AB 5 because the rate reduction under AB 1183 had already been enjoined by the Ninth Circuit on April 6, 2009, in *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009). Pet. 11.

of between $40 and $55 million per year. Moreover, respondents submitted fifteen declarations which were virtually uncontested and unrefuted showing that they would have to curtail or eliminate significant programs, services, and capital expenditures as a result of the petitioner's draconian rate cuts.

Petitioner readily admits that both rate reductions were enacted predominantly for budgetary reasons. Furthermore, as of October 12, 2010, neither rate reduction had been approved by the federal CMS.

B. Factual Background

The respondents are nineteen hospitals located throughout California that provide services to Medi-Cal beneficiaries.

On November 14, 2008, respondents filed a Complaint in the Northern District of California challenging the validity of the AB 5 and the AB 1183 Medi-Cal rate reductions, and seeking a preliminary injunction enjoining the implementation of those rate cuts. Respondents subsequently amended their Complaint on December 4, 2009, primarily to add additional plaintiffs.

On January 14, 2009, respondents filed a motion for a preliminary injunction enjoining the application of the AB 5 and the AB 1183 rate cuts. The district court stayed the case in its entirety pending the

Ninth Circuit's decision in *Indep. Living Ctr. of Southern Cal., Inc. v. Shewry* and denied respondents' motion for a preliminary injunction without prejudice.

Plaintiffs appealed the denial of the preliminary injunction and requested that the Ninth Circuit grant an emergency injunction. On June 2, 2009, the Ninth Circuit vacated and remanded the appeal because the district court made no findings or conclusions in support of its order denying the preliminary injunction motion.

On June 4, 2009, the district court requested "supplemental brief[s]. . .explaining whether the Ninth Circuit's April 6, 2009 Order, *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009), requires the Court to enjoin the Medi-Cal reimbursement rate cuts at issue in the present case."

On June 12, 2009, respondents filed their Supplemental Memorandum to Enjoin AB 5, and on June 17, 2009, the petitioner filed a response. On June 26, 2009, without deciding respondents' motion to enjoin AB 5, the district court continued its stay of the case pending a hearing on the motion of plaintiffs *Santa Rosa Memorial Hospital, et al.*, for centralization of this case with others in the United States District Court for the Central District of California.

On September 9, 2009, after respondents' request for centralization was denied, the district court lifted the stay and invited the respondents to file an Amended Motion for Preliminary Injunction: "This case is no longer stayed. Based on recent Ninth

Circuit decisions, including *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. July 9, 2009), the Court will allow Plaintiffs – if they so desire – to file a new brief in support of an Amended Motion for Preliminary Injunction."

On November 18, 2009, after extensive briefing, the district court granted respondents' Amended Motion for Preliminary Injunction of the AB 5 rate cuts.

However, on the very next day, November 19, 2009, in response to a letter request from the petitioner, the district court stayed the case again. On November 23, 2009, respondents filed a Motion to Vacate Stay and to Restore Preliminary Injunction, which the district court granted on December 2, 2009.

After the court restored the preliminary injunction, the petitioner refused to reinstate the pre-AB 5 interim rates. As a result, on December 8, 2009, respondents moved for an Order to Show Cause as to why the petitioner should not be held in contempt for violating the preliminary injunction Order by continuing to implement and apply the ten percent reduction to the interim Medi-Cal payments to the respondents. On December 10, 2009, the district court issued a Clarifying Order confirming that "its preliminary injunction was always intended to enjoin the ten percent reductions in both interim and final payments."

A few hours after the district court issued its Clarifying Order, the petitioner sent a letter to the district court requesting that respondents post a bond and that the court again stay the preliminary injunction pending the submission of evidence and argument on the amount of the bond. Respondents objected to the petitioner's requests. On December 16, 2009, the district court issued an order denying petitioner's request for a bond. Petitioner appealed.

On May 27, 2010, the Ninth Circuit issued its decision. The Court noted that the instant appeal is controlled by *Cal. Pharm. Ass'n v. Maxwell-Jolly*, because both AB 1183 and AB 5 give "the Department of Health Care Services no discretion to alter the rate cuts at issue here." Pet. App. 2. It also noted that "[t]he Director's attempts to distinguish *Cal. Pharmacists Association* are unavailing." Pet. App. 2. Thus, it affirmed the district court holding "that Plaintiffs demonstrated a likelihood of success on the merits that the rate reductions violate 42 U.S.C. § 1396a(a)(30)(A)[.]" Pet. App. 2.

REASONS THE PETITION SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE THE DECISIONS BELOW ARE A CORRECT APPLICATION OF THIS COURT'S SETTLED SUPREMACY CLAUSE JURISPRUDENCE

Petitioner argues that "review is warranted because the Ninth Circuit's decision on this [preemption] issue conflicts with this Court's precedent establishing limits on private rights of action against the states." Pet. 16. By this statement, petitioner apparently is making two claims: (1) that respondents' Supremacy Clause claim should be dismissed because it does not meet the standards for maintaining a private right of action under 42 U.S.C. § 1983, and (2) that Congress did not intend to create a private right of action under 42 U.S.C. § 1396a(a)(30)(A). Neither claim has merit.

A. The Courts Do Not Require That Preemption Claims Meet The Same Standards As Claims Under Section 1983

This Court has *never* held that a claim for injunctive relief based on federal preemption must meet the standards for bringing an action under Section 1983. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), several large employers brought suit against the Acting Commissioner of the New York State Division of Human Rights claiming that the State's Human

Rights and Disability Benefits Laws were preempted by the federal Employee Retirement Income Security Act ("ERISA"). The Court held that the state legislation was preempted insofar as it prohibited practices that were unlawful under ERISA. The Court explained,

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96 n.14; *see also Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985) (describing *Shaw* as "reaffirming the general rule" that a plaintiff asserting preemption under the Supremacy Clause has stated a federal claim for injunctive relief); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (enjoining a city ordinance preempted by the Federal Aviation Act); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (enjoining the State of Washington's Tanker Law because it was preempted by the federal Ports and Waterways Safety Act); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (holding that state licensing acts are preempted by the federal Occupational Safety and Health Act of 1979);

Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

Petitioner's argument fails to recognize that preemption and Section 1983 are completely different and separate avenues for enforcing federal law. The remedies available under Section 1983 are far more extensive than under preemption. Under Section 1983, a plaintiff can obtain compensatory and punitive damages against state actors in their individual capacities, compensatory damages against municipalities, and attorneys' fees. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988. In contrast, a plaintiff with a preemption claim can seek only to enforce "the proper constitutional structural relationship between the state and federal governments." *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009).

Indeed, several members of this Court have stressed that preemption claims and Section 1983 serve different purposes and have different requirements. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), for example, Justice Kennedy explained that even though he would have held that the plaintiff could not bring its action under Section 1983, nevertheless:

> we would not leave the [plaintiff] without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 does not provide the exclusive relief that the federal courts

> have to offer. . . . [P]laintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes.

Id. at 119 (Kennedy, J., dissenting) (citations omitted).

B. A Supremacy Clause Claim Does Not Depend On A Private Right Of Action

Petitioner also suggests that Congress did not intend to create a private right of action under 42 U.S.C. § 1396a(a)(30)(A). *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Alexander v. Sandoval*, 532 U.S. 275 (2001). That concept, however, is irrelevant because the remedy in the instant case is supplied by the Supremacy Clause, and does not depend upon an implied private right of action. As this Court has explained, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002) (rejecting the assertion that a district court could not reach the merits of a preemption claim unless the plaintiff had demonstrated a statutory cause of action).

C. The Committee Reports Relating To The Boren Amendment Are Irrelevant

Petitioner cites a few sentences from Committee reports relating to the Boren Amendment, and jumps to the conclusion that "Congress, in repealing the Boren Amendment, evinced a clear intent. . .to preclude [all] private provider challenges[.]" Pet. 17. Petitioner is wrong.

The Boren Amendment (42 U.S.C. § 1396a(a)(13)(A)) and Section 1396a(a)(30)(A) are separate and distinct provisions of the Medicaid Act. At the time of the Boren Amendment's repeal, Section 1396a(a)(30)(A) had consistently been held to impose an independent, enforceable requirement in establishing reimbursement standards for provider services. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998); *Visiting Nurse Ass'n of North Shore, Inc. v. Bullen*, 93 F.3d 997, 1004 (1st Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997); *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996); *Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993). The Boren Amendment's "repeal, like its enactment, modified § 13(A) alone; it effected no change to § 30(A)." *Alaska Dep't of Health & Soc. Servs. v. Centers for Medicare & Medicaid Servs.*, 424 F.3d 931, 940-941 (9th Cir. 2005).

Petitioner's reliance on a 1997 committee report discussing the repeal of the Boren Amendment that described the repeal as precluding enforcement by providers of "any other" provision of Section 1396a,

H.R. Rep. No. 105-149, at 591 (1997), does not alter the fact that the text of Section 1396a(a)(30)(A) was not amended in 1997. Thus, the legislative history cited by petitioner is irrelevant. *See Doe v. Chao*, 540 U.S. 614, 626-627 (2004).

The legislative history cited by petitioner is also irrelevant for two additional reasons. Because respondents are not relying upon an implied private right of action to enforce Section 1396a(a)(30)(A), but instead are relying upon the Supremacy Clause, Congressional intent is not relevant. Also, when a State makes the decision to participate in the Medicaid program, it is bound to comply with federally imposed conditions, irrespective of whether or not the law contains a congressionally created implied private right of action. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

D. Over Half Of The Medicaid Expenditures In California Are Paid For With Federal Dollars

Although petitioner complains of the cost to comply with federal law (*see*, Pet. 20), the federal government matches or exceeds State dollars for Medi-Cal. The federal government paid half of California's Medi-Cal expenditures prior to October 2008, and will pay more than half of California's Medi-Cal expenditures for the period of October 2008 to December 2010 pursuant to the *American Recovery and Reinvestment Act of 2009* (hereinafter "*ARRA*"), Pub.

L. No. 111-5, 123 Stat. 115. Under the *ARRA*, the federal government is expected to spend over $11 billion on Medi-Cal for that period. Kaiser Commission on Medicaid and the Uninsured, *American Recovery and Reinvestment Act (AARA): Medicaid and Health Care Provisions* (Mar. 2009), at http://www.kff.org/medicaid/upload/7872.pdf. In return for this infusion of billions of federal dollars, it is only right that the State of California be required to comply with federal law.

E. There Is A Dearth Of Successful Supremacy Clause Cases Outside Of California

Petitioner baldly asserts that "DHCS is aware of over 40 Supremacy Clause lawsuits across the country that have been spurred by the Ninth Circuit's *Independent Living* decisions." Pet. 20. This statement should be rejected for several reasons. The Court has no way of knowing if the statement is correct because petitioner did not provide any details to support it; nor does petitioner demonstrate whether the rate at which Supremacy Clause cases are being filed has increased, decreased, or remained the same from prior years. Also, even though petitioner claims that the *Independent Living* decisions "spurred" the Supremacy Clause lawsuits, petitioner does not and cannot establish a causal connection between these two events. Indeed, since the *Independent Living Center* ("*ILC*") decisions are based on this Court's settled Supremacy Clause jurisprudence,

it is unlikely that the *ILC* cases were an instigating factor in any of the 40 cases cited by petitioner.

In connection with its petition for certiorari in *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, U.S. Supreme Court Case No. 09-0958, the petitioner here submitted detailed case information concerning the Supremacy Clause lawsuits that have been filed. *Id.* at Pet. App. 211a-223a. Based on that information, it is clear that only 14 Supremacy Clause cases were filed in federal courts outside of California, and that injunctions were issued in only two of those cases. *Id.* Thus, there is not an epidemic of Supremacy Clause cases outside of California, and the results of the few lawsuits that do exist demonstrate that States that properly follow the mandates of federal Medicaid law (as most do, except California) will not lose any Medicaid monies.

F. The Courts Of Appeals Have Uniformly Reached The Same Conclusion As The Court Below

Petitioner claims that "[r]eview is also warranted to resolve a conflict among the courts of appeals on this [preemption] issue." Pet. 18. Petitioner is wrong here too.

Petitioner readily admits that "[t]he D.C., Fifth, Eighth, and Ninth Circuits have held that private parties may bring preemption claims under Spending Clause statutes even if Congress did not intend to make the statutes privately enforceable." Pet. 18. It

also concedes that "[t]he First Circuit. . .has indicated a willingness to allow private causes of action for preemption based on Spending Clause statutes even where the statute in question is not privately enforceable." Pet. 18 n.4. And, it acknowledges that "[s]everal other circuits [*e.g.*, Second, Third, Tenth]. . .have held that at least some preemption claims may be brought under non-Spending Clause statutes regardless of whether the federal statutes create privately enforceable rights." Pet. 18 n.4.

The only exception the Petitioner cites is the Eleventh Circuit, where it claims that the Court "has squarely held that 'the Supremacy Clause does not grant an implied cause of action,'" citing *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990). Pet. 18, 19. However, petitioner misinterprets that decision and subsequent Eleventh Circuit case law. In *Pegues*, the alleged violation of federal law arose from the EPA Administrator's interpretation of federal law, which Alabama merely followed. The actual holding of *Pegues* was that "[b]oth [plaintiff] LEAF and the state agree that the proposed permits *comply* with the federal statute and regulations as they have been interpreted by the EPA. . . . LEAF's real dispute, therefore, is not with the state, but with the Administrator." *Id.* at 644 (emphasis added). The court noted that Congress had created an express cause of action against the federal agency, but the plaintiffs had not relied on that cause of action. The court therefore rejected the plaintiff's attempt "to bootstrap a statutory claim that should be

asserted against the Administrator into a constitutional issue" of preemption. *Ibid.* Premised as it was on the conclusion that plaintiff was simply suing the wrong government, *Pegues* does not conflict with the decisions of the other circuits.

The Eleventh Circuit's subsequent *en banc* decision in *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (11th Cir. 2003), demonstrates that petitioner has misread *Pegues*. *BellSouth* involved a suit by a phone company against a state public service commission claiming that the commission's decision was contrary to the Federal Telecommunications Act of 1996. The *en banc* court held that, apart from any express cause of action available under the statute, "[f]ederal courts must resolve the question of whether a public service commission's order violates federal law and any other federal question as well as any related issue of state law under its pendent state jurisdiction." *Id.* at 1278.

Moreover, this Court has repeatedly adjudicated claims by private parties asserting preemption by virtue of the Medicaid statute and other federal spending statutes. In *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), a Medicaid recipient sought a declaratory judgment that a state law was preempted by the Medicaid Act, and this Court unanimously agreed. In *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003), drug makers also brought an action asserting preemption of a state law under the Act. *See also*

Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996) (per curiam) (preemption under Medicaid); *Blum v. Bacon*, 457 U.S. 132, 138 (1982); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269-270 (1985); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.).

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION BECAUSE THE DECISIONS BELOW ARE A CORRECT APPLICATION OF FEDERAL LAW

Petitioner contends that the Ninth Circuit's application of 42 U.S.C. § 1396a(a)(30)(A) is "atextual" and that it "conflicts with the holdings of every other circuit." Pet. 22, 24. Neither claim is correct.

A. The Court Of Appeals Correctly Applied 42 U.S.C. § 1396a(a)(30)(A)

42 U.S.C. § 1396a(a)(30)(A), the provision at issue in this case, provides that a state plan

> must. . .provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan. . .as may be necessary [1] to safeguard against unnecessary utilization of such care and services and [2] to assure that payments are consistent with efficiency, economy, and quality of care and [3] are sufficient

> to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A) (bracketed numbers added).

The decision below is fully consistent with the foregoing text. The plain language of the statute requires that States that participate in Medicaid "provide such methods and procedures" relating to "the payment for" medical care and services "to assure that payments are consistent with efficiency, economy, and quality of care." This language clearly requires that reimbursement rates be based upon an analysis of hospital costs sufficient to *assure* that payments are consistent with the efficiency, economy, and quality of care ("EEQ") factors.

The petitioner claims that 42 U.S.C. § 1396a(a)(30)(A) does not "require any type of study." Pet. 22. However, petitioner does not and cannot explain how it can otherwise "assure" that its "payments are consistent with efficiency, economy, and quality of care" without such a study. "Assure" is defined by Black's Law Dictionary as "to make certain and put beyond doubt." Black's Law Dictionary (6th ed. 1990). Without a study, petitioner cannot "make certain and put beyond doubt" that its payments are consistent with the EEQ factors.

Petitioner also claims that "a study would serve no useful purpose because rates are already based on providers' actual costs." Pet. 15. However, the fact that the rate reduction is based on actual costs doesn't obviate the need to study the effects of that rate reduction on the EEQ factors, nor does it mean that the rate, as reduced, would satisfy the EEQ requirements of Section 30(A).

Petitioner also objects to the requirement that the study be completed prior to the enactment of the rate reduction. This requirement exists because any consideration of the Section 30(A) factors is meaningful only if it actually impacts the rate setting process: "any analysis of reimbursement rates on the statutory factors of efficiency, economy, quality, and access to care, must have the potential to influence the rate-setting process." *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1109 (9th Cir. 2010). This is particularly true in cases like the instant one where the legislature is setting rates that cannot be changed by the state agency: "AB 1183 gives the Department no discretion to alter the rate cuts based on the Department's own analysis, and, therefore, the cuts were not 'based on' the Department's consideration of the relevant factors, but instead constituted a *post hoc* rationalization for a legislative decision that had already been made." *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009).

B. The Federal CMS Has Embraced The Ninth Circuit Analysis Of 42 U.S.C. § 1396a(a)(30)(A)

In *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931 (9th Cir. 2005), the federal CMS rejected a state rate amendment on the ground that it was inconsistent with the statutory requirement of efficiency, economy, and quality of care. CMS disapproved the proposed amendment as inconsistent with Section 30(A) because the "proposed rates would substantially exceed the IHS [Indian Health Service] published rates" on which federal payments have historically been based. 424 F.3d at 937. It further explained that the IHS rates are "based on an analysis of statewide costs of the Alaska IHS facilities" and that, while it "might consider a request for a higher rate if supported by data showing costs that were not considered by IHS in setting the published rates, Alaska provided no such data to substantiate its proposed rates." *Id.* Hence, CMS concluded that, absent such data, the proposed rates "are not consistent with efficiency, economy, and quality of care" under Section 30(A). *Id.*

Thus, like the Ninth Circuit, CMS also requires that rates be based on a study of the EEQ factors.

C. The District Court Expressly Considered The Evidence Presented By The Petitioner And Correctly Rejected It

Prior to claiming that it relied on cost studies, the petitioner repeatedly argued that it was under no legal duty to consider cost studies when determining Medi-Cal rates under Section 30(A). In *Indep. Living Ctr. of Southern Cal., Inc. v. Shewry*, 2008 U.S. Dist. LEXIS 77525 (2008), petitioner claimed that "neither the Legislature, nor the Department has a duty to consider any particular factors or to conduct any particular studies."

Yet, in the district court here, the petitioner claimed that "there were three relevant studies before the Legislature prior to the enactment of AB 5" and that it conducted additional studies "[a]fter AB 5 was enacted, but prior to its July 1, 2008 implementation." Pet. 12. The District Court carefully reviewed each of these "studies" and correctly rejected them as not complying with the requirements of federal law.

One document the petitioner mentioned was the Legislative Analyst's Office ("LAO") Report analyzing the 2008-09 budget. According to the lower court, "the District Court for the Central District of California has already determined that 'all the Legislative Analyst's report shows is that such a report was prepared. Respondent has not shown that the Legislature ever reviewed or considered the concerns raised therein.'" Pet. App. 116. The lower court also stated that "[s]imilarly, here, Defendant has presented

no evidence that the Legislature or the Department ever reviewed or considered this report prior to setting the rate reductions that apply to Plaintiffs. Indeed, nowhere in the LAO Report is there any analysis of non-contract hospital costs." Pet. App. 116-117.

Another document referred to by the petitioner was the 2007 California Medical Assistance Commission ("CMAC") Annual Report. However, the district court found "that this report is irrelevant" because it "exclusively concerns contract hospitals, not the non-contract hospitals who are Plaintiffs in this case." Pet. App. 17.

The third document mentioned by the petitioner was the November 2005 analysis by the Department concerning a similar reimbursement rate reduction in 2004-2005. However, according to the lower court, the "Defendant presented no evidence that the Department or the Legislature actually reviewed it" and "[e]ven if they did, this document does not consider the impact of AB 5 on non-contract hospital costs." Pet. App. 17-18.

Relying upon the declarations of two Department employees, Liu and Wong, petitioner also contended that "the Department used the four-month period between the enactment and implementation of AB 5 to determine whether the reimbursement reductions satisfied the requirements of § 30(A)." Pet. App. 18.

According to the district court, "William Liu declares that the Department conducted an analysis

of the impact of [Cal. Welf. & Inst. Code] section 14166.245 prior to its implementation." Pet. App. 18. However,

> the document submitted to support this claim merely consists of annual estimates of recoupment collected by the PIRL program and percentages of total reimbursement for noncontract hospitals between 1999 and 2005. This document does not support the contention that the Director relied on responsible cost studies when adjusting the reimbursement rates at issue to determine whether these reimbursement rate reductions were consistent with efficiency, economy, quality of care, and access.

Pet. App. 18-19.

The district court also noted that Gary Wong had declared that "the Department analyzed whether the reduced reimbursement payments would be reasonable relative to hospitals' costs prior to implementation." Pet. App. 19. The court observed that Wong

> supports his claim by pointing to only two documents. The first is the November 2005 Analysis that the Court has already found inadequate to show that the Department complied with its statutory obligations. . .The second is a one-page, handwritten, summary comparison of how audited allowable costs compared to reported costs for unidentified noncontract hospitals between 2002 and 2005. . .This document is clearly inadequate to show the Department relied on

> responsible cost studies to determine that the ten percent reduction was consistent with efficiency, economy, quality of care, and access.

Pet. App. 19.

Based on the foregoing, the lower court concluded that "the Liu and Wong declarations and attached exhibits are not sufficient to show the Department complied with federal requirements." *Id.*

Thus, the district court carefully reviewed all of the information that the petitioner presented with respect to the EEQ factors, and correctly rejected it for the reasons set forth above.

D. The Decision Below Is Consistent With The Other Circuits

In *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1107 (9th Cir. 2010), the Ninth Circuit explicitly examined the approach used in other circuits and concluded that its "approach is consistent with that of our sister circuits, where in the context of legislative, as opposed to agency, rate-setting, they too have focused on ensuring that the legislative body had information before it so that it could properly consider efficiency, economy, quality of care, and access to services before enacting rates."

The decisions cited by petitioner are irrelevant for a variety of reasons.

The Eighth Circuit decision in *Minn. Homecare Ass'n, Inc. v. Gomez*, 108 F.3d 917 (8th Cir. 1997) is not factually similar to the instant case because it involved an *increase* by three percent in reimbursement rates, rather than the substantial rate cuts at issue here. Although the agency in *Gomez* did not provide any formal Section 30(A) analysis to the legislature, lobbyists "actively participated in the. . .legislative session." *Id.* at 918. As a result, "the legislature adequately considered § 30(A) when it raised reimbursement rates[.]" *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010). *See also Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 530 (8th Cir. 1993) (holding that a state agency "must consider the relevant factors of equal access, efficiency, economy, and quality of care as designated in [Section 30(A)] when setting reimbursement rates.")

The Third Circuit decision in *Rite Aid of Pennsylvania, Inc. v. Houstoun*, 171 F.3d 842 (3d Cir. 1999), is also not factually similar because it involved the application of rates that even the federal CMS (formerly HCFA) had noted were too high: "Pennsylvania had good reason to revise these rates. For several years prior to 1994, the HCFA had been advising the Department that its reimbursement rates were high, given, among other reasons, changes in the drug marketplace." *Id.* at 847. The Third Circuit did not, however, find the mandates of Section 1396a(a)(30)(A) to be unessential. It noted that the agency's "process of decisionmaking" must be "reasonable and sound," and

that an agency "may not act arbitrarily and capriciously." *Id.* at 852-853.

The Fifth and Seventh Circuit cases cited by petitioner are not relevant because they address only the "equal access" prong of Section 1396a(a)(30)(A), and do not address the EEQ requirements. In *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908 (5th Cir. 2000), the Fifth Circuit considered only "the question whether recipients' access will be impaired."[3] *Id.* at 934. Similarly, in *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996), the Seventh Circuit reviewed the requirements of 42 U.S.C. § 1396a(a)(30) only in connection with the question of "equal access" and not EEQ. *Id.* at 1028-1029.

Contrary to petitioner's claim, the First Circuit never has addressed the EEQ issue because it concluded that Section 1396a(a)(30)(A) could not be enforced through Section 1983. *See Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 59-60 (1st Cir. 2004).

---

[3] The Fifth Circuit decision in *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007) is also irrelevant because it considered only whether 42 U.S.C. § 1396a(a)(30)(A) conferred individual private rights that are enforceable under Section 1983, and never reached the application of the EEQ factors.

Thus, there is no conflict in the Courts of Appeals with respect to the meaning and application of the EEQ requirement, and thus no grounds for review.

III. THIS CASE IS A POOR VEHICLE FOR THE COURT'S REVIEW

There are a number of reasons why this case is a poor vehicle for the Court's review.

First, the opinion of which petitioner seeks review is an order sustaining a preliminary injunction, a posture that "of itself alone furnishe[s] sufficient ground" for denying review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Review of such interlocutory decisions is strongly disfavored because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893).

Second, this matter is not ripe for review because petitioner's rate changes have not been approved by the federal CMS. AB 5 was enacted on February 6, 2008, and instructed petitioner to "promptly seek any necessary federal approvals for the implementation of this section." *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, U.S. Supreme Court Case No. 09-0958, Pet. App. 160a. Also, federal law requires that "all plans receive approval by the federal government before they may be implemented, and that all amendments to plans must also be

federally approved." *Exeter Mem'l Hosp. Ass'n v. Belshe*, 145 F.3d 1106 (9th Cir. 1998). Despite these legal requirements, petitioner implemented the AB 5 rate cuts on July 1, 2008, without federal approval.

Furthermore, petitioner has intentionally stalled the federal review process. Petitioner submitted its state plan amendment to CMS on September 30, 2008, approximately three months after it implemented the AB 5 rate cuts. *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, U.S. Supreme Court Case No. 09-0958, Pet. App. 187a-210a. In December 2008, CMS responded with a nineteen-page request for additional information. *Id.* at Resp. App. 1a-20a. That letter concluded by explaining that the request for additional information "has the effect of stopping the 90-day clock with respect to CMS taking further action on this State plan submittal" and stating that a "new 90-day clock will not begin until we receive your response to this request for additional information." *Id.* at Resp. App. 20a. Finally, the letter stated that "[i]n accordance with our guidelines to all State Medicaid Directors dated January [2], 2001, we request that you provide a formal response to this request for additional information within ninety (90) days of receipt." *Ibid.*

It has now been over 24 months since CMS sent that letter and respondents are informed by CMS that, as of October 12, 2010, petitioner had still not responded. Under the guidelines referenced in the CMS letter, when a State does not respond to a request for additional information within 90 days, CMS

"will initiate disapproval action on the amendment." Letter from Timothy Westmoreland, Director, Health Care Finance Administration, U.S. Dep't of Health & Human Servs., to State Medicaid Directors, at 1 (Jan. 2, 2001), at http://www.cms.hhs.gov/smdl/downloads/smd010201.pdf (last visited October 9, 2010).

Due to petitioner's extraordinary delay in responding to CMS's request for additional information, it is unclear if and when approval or disapproval of the AB 5 rate reduction will occur. If CMS disapproves the rate reduction, which appears likely based on its guidelines, then the issues in this case will become moot. This uncertainty makes this case an extraordinarily poor vehicle to address petitioner's claims.

Third, this Court does not grant review in cases unless a reversal would change the position of the parties in some concrete fashion. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). In this case, a reversal would not change the ultimate outcome of the case because respondents can seek the relief they want in State court by pursing a writ of mandate (Cal. Code of Civil Proc. § 1085). Indeed, the California courts have consistently compelled State officials to comply with provisions of the Medicaid Act, including the very statutory provision at issue in the instant case, 42 U.S.C. § 1396a(a)(30)(A). *See, e.g., Cal. Hospital Ass'n v. Maxwell-Jolly*, 2010 WL 3280274 (Cal. App. 1 Dist.) (2010); *Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168 Cal.App.4th 460 (2008),

rev. denied (Cal. 2009); *Cal. Ass'n for Health Servs. at Home v. Department of Health Servs.*, 148 Cal.App.4th 696 (2007); *Cal. Ass'n of Health Facilities v. Department of Health Servs.*, No. A107551, 2006 WL 3775842 (Cal. Ct. App. Dec. 26, 2006).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: October 27, 2010

Respectfully submitted,

MICHAEL S. SORGEN, ESQ.
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton St., Ninth Floor
San Francisco, CA 94108
Telephone: (415) 956-1360
Facsimile: (415) 956-6342
Email: msorgen@sorgen.net

DEAN L. JOHNSON, ESQ.*
DEAN L. JOHNSON, INC.
6863 Tanzanite Dr.
Carlsbad, CA 92009
Telephone: (760) 603-0022
Facsimile: (866) 373-9348
Email:
deanl.johnson@gmail.com

**Counsel of Record*

Counsel for Respondents

22 CCR § 51545. Definitions

(a) The following definitions are applicable to Article 7.5 only unless otherwise specified in another section:

(1) Administrative Adjustment (AA) means the adjustment to a provider's PIRL in response to a provider's administrative adjustment request (AAR).

(2) Administrative Adjustment Request (AAR) means the provider's request for changes to the PIRL, which includes both the all-inclusive rate per discharge limitation (ARPDL) and peer grouping rate per discharge limitation (PGRPDL).

(3) Aligned ARPDs means the modified ARPDs which have been adjusted to estimate their value as of a common fiscal period ending for the purpose of computing the 60th percentile for the PGRPDL.

(4) All-Inclusive Rate Per Discharge (ARPD) means the per discharge dollar limit on Medi-Cal reimbursable costs prior to the application of the peer grouping inpatient reimbursement limitation (PIRL). The ARPD excludes return on owner's equity, disproportionate share payments and reductions for third-party liability (TPL), as referenced in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(5) All-Inclusive Rate Per Discharge Limitation (ARPDL) means a Medi-Cal inpatient reimbursement limit (MIRL) which is the all-inclusive rate per discharge (ARPD) multiplied by the number of Medi-Cal discharges. The ARPDL excludes return on owner's

equity, disproportionate share payments and reductions for TPL, as referenced in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(6) Allowable Rate Per Discharge (ARPD) means all-inclusive rate per discharge (ARPD).

(7) Atypical Case means Cost Outliers or Day Outliers.

(8) Base Period shall be for fiscal periods which begin on or after the effective date of Sections 51545 through 51557, the FPE immediately prior to the settlement period.

(9) Base Year means Base Period.

(10) Burden of Going Forward means the responsibility of a party to be the first one to present its evidence with respect to a particular issue.

(11) Burden of Proof means the responsibility of proving, by a preponderance of the evidence, the existence or nonexistence of each fact which is essential to demonstrate that a party's position regarding a disputed issue is correct.

(12) Case Mix means the mix in terms of the diagnosis related groups (DRGs) of the Medi-Cal patients served by the provider.

(13) Case Mix Index means an index that measures the average level of health care needed by a provider's Medi-Cal patients.

(14) Charitable Research Hospital means a provider which accepts catastrophically ill patients by referral only, has over 33 percent of their Gross Operating Expense (GOE) as charity care, over 1 percent of their GOE for research and has no obstetrics or nursery.

(15) Children's Hospital means in accordance with Section 14087.2 of the W&I Code, those hospitals where 30 percent of the infants and children served by the single institution qualify for Medi-Cal payment systems and the institution serves primarily children.

(16) Contract Services Costs means costs related to services provided that are covered by a contract with the Department for care of Medi-Cal inpatients, per W&I Code Section 14081.

(17) Contract Hospital means a provider that contracts with the Department, based on negotiations with the California Medical Assistance Commission (CMAC) in accordance with W&I Code Section 14081.

(18) Cost Outliers means those patients who have extraordinarily higher inpatient costs as identified by the cost outlier formulas in Section 51551.

(19) Cost Report means a report required by the Department and completed by the provider to determine the Medi-Cal Program's share of the provider's reasonable costs in accordance with applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(20) County Appropriations means the amount appropriated to the provider from the county general fund or other county sources for operating deficits or other operating needs. If a county hospital repays the county any portion of the appropriations, the repayment must be abated against current fiscal period appropriations.

(21) Customary Charges, as specified in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1, means those uniform charges allowed by Medi-Cal which are listed in a provider's established charge schedule which is in effect and applied consistently to most patients and recognized for program reimbursement.

(22) Crossover Patients means hospital inpatients who are eligible for both Medi-Cal and Medicare.

(23) Current Fiscal Settlement Period means the provider's accounting year for which a peer group inpatient reimbursement limitation (PIRL) is being determined.

(24) Day Outliers means those patients whose stay in the hospital is extraordinarily longer as identified by the day outlier formulas in Section 51551.

(25) Department means the California State Department of Health Services.

(26) Depreciation and Amortization means those amounts which represent portions of the depreciable

or amortizable asset's cost or other basis which is allocable to a period of operation.

(27) Diagnosis Related Group (DRG) means a group identified by certain clinically coherent types of patients who should have similar resource consumption within each of the universe of DRGs used in the Medicare Prospective Payment System (PPS), in accordance with applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(28) Discharge means the termination of lodging and a formal release of an inpatient by a provider. Deaths are counted as inpatient discharges. See Medi-Cal Discharge.

(29) Disproportionate Share Hospital means a provider whose Medicaid inpatient utilization rate (as defined in Section 1923(b)(2) of the Social Security Act) is at least one standard deviation above the mean Medicaid inpatient utilization rate for providers receiving Medicaid payments in the State, or where the providers's low income utilization rate (as defined in Section 1923(b)(3) of the Social Security Act) exceeds 25 percent.

(30) Economically and Efficiently Operated Providers means providers whose costs do not exceed the PIRL except for those costs that are otherwise found allowable by an AA or Formal Appeal process.

(31) Employee Benefits means the direct operating costs related to employee benefits consisting of FICA; State Unemployment Insurance (SUI) and

Federal Unemployment Insurance (FUI); vacation, holiday, and sick leave; group health insurance; group life insurance; pension and retirement; workers' compensation insurance; other payroll related employee benefits; and, other non-payroll related employee benefits.

(32) Employee Benefits Index means the factor resulting from the adjusted comparison of settlement period employee benefits expense to prior period employee benefits expense.

(33) Exempt Reimbursement means reimbursement not included in, or subject to limitation by the PIRL. These costs are limited to return on owner's equity and disproportionate share payments.

(34) Extraordinary and Unusual Events means an event of a sudden, unexpected, or unusual nature; e.g., avalanche, floods, earthquakes or other similar events whose circumstances are unavoidable regardless of the level of prudence exercised by the provider.

(35) Factor Input Price means the same as the Input Price Index.

(36) Final Peer Group Inpatient Reimbursement Limitation (PIRL) Settlement means a Departmental determination of liabilities owed resulting from a PIRL calculation based upon data audited or otherwise considered true and correct by the Department for the final settlement fiscal period, pursuant to the W & I Code Section 14170.

(37) Fiscal Period Ending (FPE) means the last day of a provider's fiscal period. A fiscal period is an accounting period established by the provider. The fiscal period is generally a twelve (12) consecutive month period; however, in some instances may be less than or exceed twelve (12) months.

(38) Fixed Costs means an operating expense or a class of operating expenses as a class, that does not vary with patient volume. Fixed costs are not fixed in the sense that they do not fluctuate or vary, but fluctuate or vary from causes independent of patient volume.

(39) Food Service Expense means those expenses for services and supplies related to the food service categories of: kitchen, dietary, and cafeteria.

(40) Formal Appeal means the provider's appeal of the Department's decision on an AAR concerning a final PIRL calculation.

(41) Formula Relief means changes in the ARPD that will carry forward into the next fiscal period's ARPD calculation.

(42) Gross Operating Expense (GOE) means the total operating expenses of the provider. This includes all expenses incurred in conducting the ordinary major activities of the provider inclusive of daily hospital services, ancillary services, research, education, general services, fiscal services and administrative services, including the physician professional component.

(43) Initial Base Period means the last fiscal period for each provider ending prior to the effective date of Sections 51545 through 51557.

(44) Input Price Index (IPI) means the weighted computation resulting in the reimbursable change in the prices of goods and services purchased by the providers (except for pass-throughs). The IPI shall consist of a market basket classification of goods and services purchased by providers, a corresponding set of market basket weights derived from each provider's own mix of purchased goods and services, and a related series of price indicators.

(45) Interim Payment Rate means the rate paid to a provider, expressed as a percentage, derived by the PIRL divided by provider's charges.

(46) Interest on Working Capital means a cost representing all interest incurred on borrowings for working capital purposes or interest on an unpaid tax liability.

(47) Interest, All Other means a cost representing all interest incurred for borrowings other than interest on working capital.

(48) Leases and Rents Costs means costs representing lease and rental expenses relating to occupying or using buildings, leasehold improvements and fixed assets not owned by the provider and not directly assignable to another cost center.

(49) Length of Stay Outliers means Day Outliers.

(50) Licenses and Taxes Costs means costs representing all license expenses and all taxes (other than tax on income).

(51) Malpractice Insurance (Hospital and Professional) Costs means costs representing liability insurance expenses, including premiums paid for physicians, the deductibles paid on claims, or the actuarially determined cost of self-insurance.

(52) Maximum Inpatient Reimbursement Limitation (MIRL) means the lowest of the following:

(A) Customary charges.

(B) Allowable costs determined by the Department, in accordance with applicable Medicare standards and principles of cost based reimbursement, as specified in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(C) ARPD limitation.

(53) Medi-Cal Discharges means those discharges where the inpatient services provided were covered by Medi-Cal for a Medi-Cal eligible beneficiary. This includes deaths, and eligible beneficiaries whose Medi-Cal covered services were paid in full or in part by third parties, if Medi-Cal was also billed for the services. Late paid claims where the patients' statistics were not included in the cost or audit report used to derive the PIRL and well newborns shall not be counted as Medi-Cal discharges. However, a well newborn whose mother is not eligible for Medi-Cal shall be counted as a discharge if the newborn is

eligible for Medi-Cal. Medicare crossover patients are not counted as Medi-Cal discharges if Medi-Cal paid only for any applicable deductibles and co-payments.

(54) MIRL Reimbursement Rate Per Discharge means the per discharge reimbursement amount under the MIRL, which has not been reduced for third-party liability, excluding any one-time relief, return on owner's equity and any disproportionate share payments. It is calculated by dividing the MIRL by the number of Medi-Cal discharges.

(55) New Hospital means any hospital:

(A) Which has a complete new physical plant that is less than three years of age and is not on the same or an adjacent property as the old physical plant; or

(B) Under new ownership, or resuming operations for the first time after a 12-month period (i.e. was closed for at least 12 months prior to being reopened under new ownership); or

(C) Which has operated under present and all previous ownerships for less than three years.

(56) New Service means an additional service developed and implemented by a Medi-Cal provider, to furnish and maintain quality inpatient hospital care to a patient population inclusive of Medi-Cal recipients.

(57) Newborn means an infant born in the hospital or delivered outside the hospital and admitted to the hospital shortly after birth.

(58) Noncontract Hospital means a provider that does not have a negotiated contract with the Department to provide medical care for Medi-Cal beneficiaries, pursuant to W & I Code Section 14081.

(59) Noncontract Service Costs means costs related to services provided to Medi-Cal inpatients, which are excluded from the provider's contract with the Department.

(60) Non-Pass-Through Costs means costs which are subject to the hospital cost index, as found in Section 51549.

(61) OSHPD means the Office of Statewide Health Planning and Development.

(62) One-Time Relief means changes in the ARPDL which only affect the settlement period and are not carried forward into the next settlement period ARPDL.

(63) OSHPD Accounting and Disclosure System means a uniform accounting and disclosure system designed by OSHPD.

(64) Outliers means Cost Outliers and Day Outliers.

(65) Partial Period Contracting Hospital means a contract hospital with a contract which covers only a partial fiscal period.

(66) Partially Contracting Hospital means a contract hospital with a contract that does not include all Medi-Cal covered services.

(67) Pass-Through Costs means cost categories for purposes of the ARPDL that are not subject to the hospital cost index. The categories are limited to: depreciation, rents, leases, interest, property tax, license fees, utilities and malpractice insurance, as defined in Section 51549.

(68) Per Diem means a daily rate paid for hospital services provided to Medi-Cal beneficiaries.

(69) Peer Group means a group of hospitals with similar characteristics that are grouped together for purposes of determining reimbursement limitations.

(70) Peer Grouping Inpatient Reimbursement Limitation (PIRL) means the lowest of the following:

(A) Customary charges.

(B) Allowable costs determined by the Department, in accordance with applicable Medicare standards and principles of cost based reimbursement, as specified in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1.

(C) ARPDL.

(D) PGRPDL.

If a provider is exempt from the peer group limits, the Medi-Cal reimbursement limitation will be

the lowest of (A), (B) or (C), identified above. All references to PIRL include MIRL.

(71) Peer Grouping Rate Per Discharge Limitation (PGRPDL) means a Medi-Cal inpatient reimbursement limit. The PGRPDL excludes return on owner's equity, disproportionate share payments and reductions for third-party liability. The PGRPDL is the 60th percentile ARPD of each provider's peer group multiplied by the provider's number of Medi-Cal discharges.

(72) Pharmacy Expense means those expenses for services and supplies related to the pharmacy. The cost of drugs dispensed to inpatients are also included in this category.

(73) Primary Health Service Hospital means a provider that is either (1) located outside of a standard metropolitan statistical area, and located at least 15 miles from another licensed acute care hospital, and has 60 or fewer acute care beds; or (2) is located at least 20 miles from any other licensed acute care hospital, and has 60 or fewer acute care beds; or (3) be the only licensed acute care hospital in the county, and has fewer than 100 acute care beds as defined by Health and Safety Code Section 1339.9.

(74) Prior Fiscal Period means the most recent fiscal period ending prior to the period in which a PIRL is being determined.

(75) Productive Hours means the total paid hours less hours not on the job. Hours not on the job

include: vacation time; sick time; holidays; and other paid time off.

(76) Productive Salaries means the total direct payroll costs for productive hours related to a given classification.

(77) Professional Fees means fees for professional services consisting of medical (therapist and others); consulting and management fees; legal; audits; registry nurses and contracted services.

(78) Provider means an institution in California that furnishes inpatient hospital services to Medi-Cal beneficiaries.

(79) Purchased Services means costs related to services purchased from outside contractors.

(80) Rate Per Discharge means ARPD.

(81) Reasonable Costs means reimbursable costs as defined by 42 CFR, Part 413 and HCFA Publication 15-1.

(82) Recalculated Final PIRL Settlement means a final PIRL settlement which has been recalculated.

(83) Reimbursable Costs means those costs that are reimbursed as determined by the PIRL.

(84) Replacement Service means a newly implemented service which replaces another service in whole or in part.

(85) Rural Hospitals means consistent with Section 1188.855 of the Health and Safety Code, an acute care hospital which meets the criteria within peer group six (rural hospitals) as defined in the report entitled, "Hospital Peer Grouping for Efficiency Comparison" dated December 20, 1982.

(86) Salaries and Wages means the direct operating costs related to salaries and wages, consisting of: management and supervision; technicians and specialists; registered nurses; licensed vocational nurses; aides and orderlies; clerical and other administrative; environmental and food services; non-physician medical practitioners; and other salaries and wages. Those salaries and wages related to students from the medical education centers as well as physicians are not included here.

(87) Salary and Wage Index means the factor which is defined as part of the calculations in Section 51549(b)(2)(A)1.

(88) Second Level Appeal means Formal Appeal.

(89) Service Intensity means changes in the character of the services provided to each patient including but not limited to: changes in applicable technology; qualitative and quantitative changes in: personnel; supplies; drugs; and other materials. Service intensity does not include changes in the types of patients and illnesses treated.

(90) Settlement Fiscal Period means the provider's accounting period for which a PIRL settlement is being or has been conducted.

(91) Sixtieth Percentile means the point at which sixty percent (60%) will be below in any given group arrayed in order.

(92) Sixtieth Percentile ARPD means the maximum reimbursement per discharge under the PGRPDL system. It is the sixtieth percentile rate per discharge for each peer group.

(93) Sole Community Hospital is defined in 42 USC, Section 1395ww(d)(5)(C)(iii).

(94) Student and Physician Professional Fees means fees charged for the professional services provided to patients by hospital-based physicians and students. These do not include those fees related to the education, research and administrative duties performed by the hospital-based physicians.

(95) Student and Physician Salaries and Wages means the compensation (exclusive of in-service education), of students in teaching programs and physicians including such items as research, education program activities, general hospital administration, patient care and supervision.

(96) Tentative PIRL Settlement means the Department's determination of liabilities owed, resulting from a PIRL or MIRL calculation using unaudited cost report data provided by a provider.

(97) Third-Party Liability (TPL) means amount owed for hospital inpatient services on behalf of a Medi-Cal eligible beneficiary by any payor other than Medi-Cal.

(98) Total Hospital Gross Revenue means the amount of total charges for services rendered to all patients.

(99) Total Medi-Cal Gross Revenue means the amount of charges to Medi-Cal for services rendered to Medi-Cal eligible patients.

(100) Total Paid Hours means the sum of the productive hours and the vacation time, sick time, holidays, and other paid time off for all employee classes related to daily hospital services, ancillary services, general services; fiscal services; and administrative services.

(101) Utilities means the direct expenses, excluding telephone and telegraph expenses, incurred in the operation of the hospital plant and equipment, such as, but not limited to: electricity, gas and water.

(102) Variable Costs means operating costs that vary or fluctuate with changes in patient volume.

(103) Volume Adjustment means the adjustment for changes in patient volume that applies to the provider specific all-inclusive rate per discharge for a given fiscal period.

(104) Well Newborn means those newborns who have no major medical problems who are not counted

as Medi-Cal discharges. This includes newborns classified in Medicare PPS DRGs 372 and 373.

(105) Working Capital means the difference between total current assets and total current liabilities.

---

22 CCR § 51546. Reimbursement Limits

(a) For provider fiscal periods beginning on or after the effective date of this Section, reimbursement for in-state hospital inpatient services provided to Medi-Cal program beneficiaries not fully covered by a negotiated contract as allowed in W&I Code Section 14081, shall be the least of the following four items except as stated in (b), (d), (f), (g), and (h) for each provider:

(1) Customary charges.

(2) Allowable costs determined by the Department, in accordance with applicable Medicare standards and principles of cost based reimbursement, as specified in applicable parts of 42 Code of Federal Regulations (CFR), Part 413 and HCFA Publication 15-1.

(3) All-inclusive rate per discharge limitation (ARPDL).

(4) The peer grouping rate per discharge limitation (PGRPDL).

(b) The following adjustment shall be made to items (1) and (4) above:

(1) Providers shall also be reimbursed for disproportionate share payments if applicable.

(2) The least of the four items listed in (a)(1)-(4) above shall be reduced by the amount of third-party liability.

(c) Amounts determined under (a)(3) or (a)(4) above may be increased only by an AA or appeal.

(d) New hospitals and rural hospitals shall be exempt from the provisions of this Article relating to the MIRL and PIRL. New and rural hospitals shall be reimbursed in accordance with the lesser of subsections (a)(1) or (a)(2) above, and subject to any limitations provided for under federal law and/or regulation.

(e) Each provider shall be notified of the ARPDL and PGRPDL at the time of tentative and/or final PIRL settlements. If only a final PIRL settlement is issued, it shall take the place; of both the tentative and final PIRL settlement.

(f) Payments for Medicare covered services provided to Medicare/Medi-Cal crossover patients shall not be subject to the limitations specified in this Section. These services shall be reimbursed only for the Medicare deductibles and co-insurance amounts. The deductibles and co-insurance amounts shall not exceed the state reimbursement maximums. State reimbursement maximums shall be the interim rate

times charges after consideration of the Medicare payment.

(g) Payment for skilled nursing facility services shall be made in accordance with Section 51511.

(h) Payment for intermediate care facility services shall be made in accordance with Section 51510.

---

22 CCR § 51547. Methods of Payment

(a) The methods of payment for inpatient hospital services under the MIRL shall include the following:

(1) An ARPD that shall be retrospectively established for each provider's tentative and final settlement fiscal period. The ARPD shall:

(A) Apply to all non-contract Medi-Cal inpatient covered services provided by the provider during its settlement fiscal period. It shall be based upon the statistics included in the providers Medi-Cal cost or audit report.

(B) Be updated annually to reflect reimbursable changes in factor input prices, service intensity, technology, productivity, patient volume, and other items as allowed through the AA and appeals process.

(2) An interim payment rate based upon an actual or projected reimbursable cost to charge ratio.

(A) The current interim payment rate shall be based on the lower of the following:

1. The latest tentative settlement fiscal period for which a final settlement has not been issued.

2. The latest final (which also includes recalculated finals) settlement fiscal period.

(B) Interim payment rates calculated under (A) may use data from settlements that have been previously issued if needed to determine the lower of 1. and 2. above.

(C) When newly-established providers do not have cost experience on which to base a determination of an interim rate of payment. In such cases, the Department will use the following methods to determine an appropriate rate:

1. If there is a provider or providers comparable in substantially all relevant factors to the provider for which the rate is needed, the Department will base an interim rate of payment on the reimbursable costs and customary charges of the comparable provider.

2. If there are no substantially comparable providers from whom data are available, the Department will determine an interim rate of payment based on the budgeted or projected reimbursable costs and customary charges of the provider.

3. Under either method, the Department will review the provider's cost and charge experience and adjust the interim rate of payment in line with the provider's cost and charge experience.

4. The Department may prohibit increases in the accommodation rates, as defined in applicable parts of 42 CFR, Part 413 and HCFA Publication 15-1, charged by the provider if the Department projects that such increases would cause their interim payments to exceed the PIRL.

5. Newly established providers may appeal their interim rate if it is based upon the criteria in (a)(2)(C)1. through 4., in accordance with the AAR procedures specified in Section 51550.

---

22 CCR § 51548. Overpayments

(a) Interim payment rate adjustments and recovery of overpayments to providers shall be made at tentative or final settlement based upon the application of this Article.

(1) Such overpayments shall be collected and such interim payment rates shall be adjusted whether or not appeals of any audit, MIRL or PIRL for the current or any prior fiscal period have been filed by the provider.

(2) Interim payment rates calculated after the effective date of Article 7.5, Sections 51545 through 51557, and applied to services provided after the effective date of this regulation, shall comply with Sections 51547 and 51548 even if the actual settlement upon which the new interim rate is based, is not subject to this regulation.

22 CCR § 51549. Reimbursement Formula

(a) A hospital cost index (HCI) shall be established for each provider. This index shall consist of an input price index (IPI) and shall contain an allowance for changes in scientific and technological advancement, service intensity and productivity. The allowance shall be called the Service Intensity, Productivity, Scientific and Technological Advancement Factor (SIPTF).

(1) The HCI shall be calculated to account for actual changes in the IPI after the close of each provider's accounting period.

(2) The HCI shall be multiplied by the non-pass-through portion of the provider's MIRL reimbursement rate per discharge (tentative or final) for the prior fiscal period to determine the non-pass-through portion of its ARPD for the settlement fiscal period.

(A) The prior period shall always be the base period for each settlement.

(B) For the initial base period only, the non-pass-through portion of the ARPD shall be calculated as follows:

1. Step 1, add the amount of TPL for the initial base period to the MIRL (lowest of 51536(a)(1)-(3)) which includes amounts reimbursed under the AA and appeals process for the initial base period.

2. Step 2, recalculate Medi-Cal discharges for any initial base period in accordance with the definition of Medi-Cal discharges contained in Section 51545.

a. The Department shall notify the provider of the revised count of Medi-Cal discharges for the initial base period.

b. The provider may file an AAR on the count of Medi-Cal discharges for the initial base period only and only as it is used in the settlement period MIRL. The AAR must be filed within 60 days of notification of the number of Medi-Cal discharges for the initial base period.

c. The provider may file an appeal on the Department's response to the AAR in accordance with Section 51552.

3. Step 3, divide the result of step 1 by the result of step 2.

4. Step 4, multiply the percentage of non-pass-through costs for the initial base period by the result of step 3.

5. Use the result of step 4 in place of the PNPARPD in the ARPD formula in subsection (3) below.

(3) The ARPD shall be calculated as follows:

ARPD = PASPD + NPARPD.

= PASPD + (PNPARPD * HCI)

= (TPTC/THD) + (PNPARPD * ((AIPI * CMAF) + SIPTF))

Where ARPD = All-inclusive Rate Per Discharge.

PASPD = Pass through per discharge = TPTC/THD

TPTC = Total pass through costs in the settlement fiscal period

THD = Total hospital discharges in the settlement fiscal period.

NPARPD = Non-Pass-through All-inclusive Rate Per Discharge.

NPARPD = PNPARPD * HCI

PNPARPD = Prior year Non-Pass-through portion of the MIRL reimbursement rate per discharge which is,

((PMIRL – (PMCDIS * (PTPTC/PTHD)))/PMCDIS)

Where:

PMIRL = Prior fiscal period MIRL.

PMCDIS = Prior fiscal period number of Medi-Cal discharges.

PTPTC = Prior fiscal period total pass through costs.

PTHD = Prior fiscal period total hospital discharges

HCI = Hospital Cost Index =

((AIPI) ** (Days/730))* CMAF) + (SIPTF. **(days/730))

If the prior or settlement fiscal period is long (over 370 days) or short (under 360 days). If both fiscal periods are over 359 days and under 371 days HCI = (AIPI * CMAF) + SIPTF.

Where:

AIPI = Adjusted Input Price Index.

SIPTF = Allowance for Service Intensity, Productivity, and Scientific and Technological advancement Factor.

Days = Sum of days in the current and prior fiscal periods.

CMAF = Case mix adjustment factor.

* = Multiplication.

** = Exponentiation.

(4) An annual allowance for service intensity, productivity and scientific and technological advancement shall be added to the allowable increase in the non-pass-through portion of the ARPD, as detailed in the formulas in this section. This allowance shall be in addition to reimbursement for pass-through

categories and shall be the net amount of changes for scientific and technological advancement, productivity improvement and service intensity, if any (excluding case mix), as recommended annually by the prospective payment assessment commission for the Medicare PPS for all FPEs during the PPS effective dates of the recommended allowance.

(5) The pass-through categories are those hospital cost categories which, for purposes of tentative and final settlement, are not subject to the HCI.

(6) Each pass-through category is listed below:

(A) Depreciation.

(B) Rents and Leases.

(C) Interest.

(D) Property Taxes and License Fees.

(E) Utility Expenses.

(F) Malpractice Insurance.

(b) An IPI shall be established to compute the reimbursable change in the prices of goods and services purchased by the providers (except for pass-throughs). The IPI shall consist of a market basket classification of goods and services purchased by providers, a corresponding set of market basket weights derived from each provider's own mix of purchased goods and services, and a related series of price indicators.

(1) Weights corresponding to market basket categories shall be derived and updated for each settlement fiscal period. These weights shall be computed using the latest available information from each provider's Medi-Cal cost report. If information from this source is not sufficient to establish a hospital specific weight for a particular market basket category, the Department shall assign a weight based on information from the United States National Hospital Input Price Index published by the Department of Health and Human Services, or other available sources.

(2) The IPI shall be calculated after the close of each hospital's FPE, to account for actual and/or estimated changes in the:

(A) Hospital specific wage and benefit rates.

1. The index for allowable changes in wages shall be computed as follows:

Salary and Wage Index (SWI) = CLSA/ACSA.

Where:

CLSA = Summation of (PYHx * CYHRx) for all x.

ACSA = Summation of all Actual Prior Fiscal Period Salaries for all x categories.

x = The following categories:

a. Technicians and Specialists.

b. Registered Nurses.

c. LVNs.

d. Aides and orderlies.

e. Clerical and other administrative.

f. Environmental and food service.

PYHx = Prior Fiscal Period Productive Hours.

CYHRx = Current (Settlement) Fiscal Period Hourly Rate = CYSx/CYHx.

CYSx = Current (Settlement) Fiscal Period salary Expense for each category.

CYHx = Current (Settlement) Fiscal Period productive Hours.

2. The Employee Benefits Index (EBI) shall be computed as follows:

EBI = (PYHT * CYBR)/PYB.

Where:

PYHT = Prior Year (Prior Fiscal Period) Paid Labor Hours for All Labor Categories.

CYBR = Current Year (Settlement Fiscal Period) Benefit Rate = CYB/CYHT.

PYB = Prior Year (Prior Fiscal Period) Benefits Costs.

CYB = Current Year (Settlement Fiscal Period) Benefits costs.

CYHT = Current Year (Settlement Fiscal Period) Labor Hours for All Labor Categories.

3. The SWI and EBI shall be annualized for any provider which has a short or long (under 360 or over 370 days) prior or current fiscal period.

(a) The SWI shall be adjusted using the following formula:

ASWI = SWI ** (730/Days).

ASWI = Adjusted SWI.

Where Days = Total days in the current and prior fiscal periods.

(b) The EBI shall be adjusted using the following formula:

AEBI = EBI ** (730/Days).

Where:

AEBI = Adjusted EBI.

Days = Total days in the current and prior fiscal periods.

(c) If the SWI and EBI are not annualized, then the ASWI = SWI and AEBI = EBI.

(B) Price indicators for other non-pass-through categories.

(C) Market basket weights for the following categories:

1. Salary and wages.

2. Benefits.

3. Professional fees, medical.

4. Professional fees, other.

5. Food.

6. Drugs.

7. All other non-pass-through costs.

(D) The non-pass-through costs "all other" category shall be weighted using the following weights for purposes of calculating the price indicator:

[See Table In Original]

(E) The weights for the seven market basket categories shall be the percentage of costs for each category as calculated from the Medi-Cal cost report.

(F) Each market basket weight shall be multiplied by the corresponding price indicator. The results will be summed to obtain the unadjusted non-pass-through price index.

(G) The price indicators for items under (C) (3 through 7) will be established for the end of each calendar quarter (March 31, June 30, September 30 and December 31). Any FPE other than on a calendar quarter shall use the price indicators under (C) above for the quarter in which the provider's FPEs.

1. The following five market basket categories and price indicators to be used in developing each provider's IPI are shown in the following table.

Non-Pass-Through Market Basket Classification (Excluding Wages and Benefits)

[See Table In Original]

2. The price index shall be 1.0 + the percentage increase in each service category as measured by the price indicator, expressed as a proportion.

(3) The formula for the hospital IPI shall be:

IPI = (PX1 * PGE1) + (PX2 * PGE2) + (PX3 * PGE3) + (PX4 * PGE4) + (ASWI * PGE5) + (AEBI * PGE6) + (PXO * PGE7)

Where:

IPI = Input Price Index.

PX1 = Price Index for Medical Professional Fees.

PX2 = Price Index for Other Professional Fees.

PX3 = Price Index for Food Costs.

PX4 = Price Index for Drug Costs.

ASWI = Adjusted Salary and Wage Index.

AEBI = Adjusted Employee Benefit Index.

PXO = Price Index for Other Costs.

PGE1 = Proportion of non-pass-through GOE which is for Medical Professional Fees for the prior fiscal period.

PGE2 = Proportion of non-pass-through GOE which is for Other Professional Fees for the prior fiscal period.

PGE3 = Proportion of non-pass-through GOE which is for Food Costs for the prior fiscal period.

PGE4 = Proportion of non-pass-through GOE which is for Drug Costs for the prior fiscal period.

PGE5 = Proportion of non-pass-through GOE which is for Salary and Wages for the prior fiscal period.

PGE6 = Proportion of non-pass-through GOE which is for Employee Benefits for the prior fiscal period.

PGE7 = Proportion of non-pass-through GOE which is for Other Costs for the prior fiscal period.

non-pass-through GOE = GOE minus total of all pass-through costs for the prior fiscal period.

(4) Providers that do not supply the data needed to calculate the IPI, shall have an IPI equal to the hospital market basket increase as calculated by HCFA, for the closest corresponding time period. For hospitals with short FPEs, the closest corresponding time period shall be the one with the closest mid-point.

(c) A volume adjustment shall be made to the provider's non-pass-through portion of the ARPD for the settlement fiscal period if the number of annualized total hospital discharges in the provider's settlement fiscal period differs from the number of annualized total hospital discharges in its prior fiscal period. The volume adjustment is used to allocate fixed costs on a per discharge basis. Provider fiscal periods (both settlement and prior) under 360 or over 370 days shall be annualized to a 365 day period based on the following formula:

ATHD = (365/DFP) * THD.

Where:

ATHD = Annualized total hospital discharges.

DFP = Days in fiscal period.

THD = Total hospital discharges.

(1) The volume adjustment shall be calculated using the following formula which adjusts the rate per discharge for estimated changes in average costs resulting from changes in volume.

VOLUME ADJUSTMENT FORMULA

AIPI = IPI * VAF

Where:

AIPI = Allowable change in the prior year non-pass-through portion of the ARPD after volume adjustment, expressed as a proportion. This is the adjusted IPI, which has not been annualized and does not include any CMAF or SIPTF.

IPI = Hospital Input Price Index.

[See Illustration In Original]

VAF = Volume Adjustment Factor

DIS[P] = Total hospital discharges in the prior fiscal period (annualized if needed).

VC = Variable cost as a proportion of total cost for the prior fiscal period.

* = Multiplication.

DIS[F] = Total hospital discharges in the settlement fiscal period (annualized if needed).

(2) Each provider's total costs, except for pass-through costs, shall be divided into the fixed and variable components shown in the following table. Data from the provider's Medi-Cal cost report or in the event it is unavailable, other direct report of expenses, shall be used to estimate the percentage of a provider's cost which varies with volume. A fixed to variable cost ratio of 50:50 shall be used when sufficient data from the provider are not available.

CLASSIFICATION OF FIXED AND VARIABLE COSTS

[See Table In Original]

(3) A provider may submit additional data on the classification of fixed and variable costs for review by the Department with the AAR. If these alternative classifications and/or data are accepted by the Department, the provider shall continue to:

(A) Utilize these accepted classifications of fixed and variable costs in all FPEs.

(B) Submit to the Department, along with their filed cost report, any required data on fixed and variable costs necessary to do the alternative calculations for all subsequent FPEs. If the provider fails to supply the data with the cost report, they shall have their interim payments reduced by 20 percent. If the data has not still been supplied 60 days after the 20

percent reduction in interim payments begins, the provider shall have their interim payments reduced by 100 percent until the data are supplied. The provider shall be given 30 days advance notice to supply the required data before any reductions in interim payments are applied under this subsection.

(4) All providers must supply the data items for each FPE necessary to do the PIRL calculations. The data must be supplied as part of each provider's Medi-Cal cost report.

(d) Summary of ARPDL formula for provider with full settlement and full prior fiscal periods:

(1) ARPDL = MCDIS *

(2) (((RENTS + LIC + PTAX + DEP + LEAS + INT + UTL + MPI) / THD) +

(3) (((PMIRL – (PMCDIS * (TPTCPP / PTHD))) / PMCDIS) *

(4) (((((PX1 * (MPFP / (GOEPP – TPTCPP))) +

(5) (PX2 * (OPFP / (GOEPP – TPTCPP))) +

(6) (PX3 * (FOODP / (GOEPP – TPTCPP))) +

(7) (PX4 * (DRUGP / (GOEPP – TPTCPP))) +

6 6

(8) ((S(PYH[k]*CYHR[k])/S(PYH[k]*PYHR[k]))*

k=1 k=1

(9) (SWP / (GOEPP – TPTCPP))) +

(10) (((PYHT * CYBR) / PYB) *

(11) (PYB / (GOEPP – TPTCPP))) +

(12) (PXO * (OTCP / (GOEPP – TPTCPP)))) *

(13) ((DIS[p] + (VC * (DIS[f] – DIS[p])))/DIS[f])) *

n m

(14) (((SDRGC[i])/MCDIS)/((SDRGP[j])/PMCDIS))) +

i=1 j=1

(15) (STA + PI + SI))))

Where:

ARPDL = All-Inclusive Rate Per Discharge Limitation.

MCDIS = Medi-Cal discharges in the settlement fiscal period.

RENTS = Rental costs for the settlement fiscal period.

LIC = License fees for the settlement fiscal period.

PTAX = Property Tax expenses for the settlement fiscal period.

DEP = Total allowable depreciation expenses for the settlement fiscal period.

LEAS = Lease expenses for the settlement fiscal period.

INT = Allowable Interest expense for the settlement fiscal period.

UTL = Allowable utility expenses for the settlement fiscal period.

MPI = Total Malpractice Insurance costs for the settlement fiscal period.

THD = Total hospital discharges for the settlement fiscal period.

PMIRL = MIRL (Lowest of rate, costs and charges) for the prior fiscal period.

PMCDIS = Medi-Cal discharges in the prior fiscal period.

TPTCPP = Total allowable pass-through costs for the prior fiscal period.

PTHD = Total hospital discharges for the prior fiscal period.

PX1 = Price index for medical professional fees.

MPFP = Allowable Medical Professional Fees for the prior fiscal period.

GOEPP = Gross Operating Expenses (GOE) for the prior fiscal period.

PX2 = Price index for Other Professional Fees.

OPFP = Allowable Other Professional Fees for the prior fiscal period.

PX3 = Price Index for Food costs.

FOODP = Allowable food costs for the prior fiscal period.

PX4 = Price Index for Drug costs.

DRUGP = Allowable costs for Drugs for the prior fiscal period.

PYH[k] = Prior fiscal period hours paid for employee classification k.

CYHR[k] = Settlement Fiscal Period Hourly Wage rate for employee classification k.

PYHR[k] = Prior fiscal period Hourly Wage Rate for employee classification k.

SWP = Allowable costs for salaries and wages for the prior fiscal period.

PYHT = Prior fiscal period paid hours.

CYBR = Settlement fiscal period hourly benefits rate.

PYB = Prior fiscal period benefits.

PXO = Price Index for Other Costs.

OTCP = Other allowable costs for the prior fiscal period.

DIS[p] = Total hospital discharges for the prior fiscal period.

VC = Variable cost proportion for the prior fiscal period.

DIS[f] = Total hospital discharges for the settlement fiscal period.

DRGC[i] = DRG weight for patient i in the settlement fiscal period.

n = Number of DRG weights in the settlement fiscal period.

DRGP[j] = DRG weight for patient j in the prior fiscal period.

m = Number of DRG weights in the prior fiscal period.

MCDISP = Medi-Cal discharges in the prior fiscal period.

STA = Adjustment factor for Scientific and Technological Advancement.

PI = Adjustment factor for Productivity Improvement.

SI = Adjustment factor for Service Intensity.

Lines 2 through 15 are the ARPD = All-Inclusive Rate Per Discharge.

Line 2 is the PASPD = Pass-through cost per discharge.

Line 3 is the PNPARPD = Prior fiscal period Non-pass through MIRL Reimbursement Rate Per Discharge.

Lines 4 through 12 are the IPI = Input Price Index.

Lines 4 through 13 are the AIPI – Adjusted Input Price Index.

Lines 4 through 15 are the HCI = Hospital Cost Index.

Line 8 is the SWI = Salary and Wage Index.

Line 10 is the EBI = Employee Benefits Index.

Line 13 is the VAF = Volume Adjustment Factor.

Line 14 is the CMAF = Case Mix Adjustment Factor.

Line 15 is the SIPTF = Allowance for Service Intensity, Productivity, and Scientific and Technological Advancement Factor.

---

22 CCR § 51550. Administrative Adjustment Process

(a) A provider may request an AA to the ARPDL or PGRPDL established for that provider if the provider's cost based allowable reimbursement for the settlement fiscal period as defined by the lower of Sections 51546(a)(1) and (a)(2), exceeds or are expected to exceed the PIRL by over $ 100. Expected to exceed only refers to the settlement period being issued and not any future settlement fiscal periods. The burden shall be on the provider to estimate, using the PIRL settlement information provided by the Department and any other information they may have, if they will expect to exceed the PIRL by over $ 100.

(b) Items that are not subject to an AA or appeal include the following:

(1) The use of Medicare standards and principles of reimbursement.

(2) The reimbursement amounts determined in Section 51546(a)(1) and (a)(2).

(3) The method for determining the IPI.

(4) The use of all-inclusive reimbursement rates.

(5) The use of a volume adjustment formula.

(6) Disproportionate share payments (these are not reduced by application of the PIRL).

(7) Data reported on the cost report which has been audited or reviewed by the Department are considered true and correct pursuant to W&I Code Section 14170. Data that was incorrectly transferred from the providers' Medi-Cal cost or audit report and used to calculate the MIRL is subject to appeal.

(8) The methodology used to calculate the interim rate.

(9) Any prior fiscal period issues.

(10) Higher costs due to low occupancy.

(11) Items not reimbursed as part of the Medi-Cal cost report process as determined in Section 51546(a)(1) and (a)(2).

(12) Increased costs. Only the cause for the increased costs may be appealable, and then only if it is otherwise an appealable item.

(13) Any issue raised in a previous formal appeal for which a decision was made by the Department for the same provider. The only exception is to incorporate into the settlement fiscal period PIRL the prior decision in the same manner as it was previously decided by the Department. These only include

decisions made for FPEs affected by Sections 51545 through 51557. This does not include issues withdrawn by the provider and thus not determined on their merits in the formal decision.

(14) Increases in average length of stay.

(15) Changes in the Cost-Based Reimbursement System as determined under Section 51546(a)(1) and (a)(2).

(16) Increased costs incurred by entering into a contract which did not contain reasonable cost increase limitations.

(17) Increases due to increased costs or charges of a related party.

(18) Any issues involving labor cost increases except for those allowed in Section 51551(b).

(19) New services.

(c) Issues involving the following MIRL (or ARPDL but not PGRPDL) items may be resolved through an AA under the procedures in Section 51551:

(1) Changes in Medi-Cal case mix and outliers.

(2) Inappropriate calculation of fixed and variable costs.

(3) An error in the calculations.

(4) Determination of whether or not a provider is exempt from the ARPDL.

(5) Extraordinary and unusual events.

(6) Labor costs as allowed under Section 51551(b).

(7) Other causes of cost increases for costs which were economically and efficiently incurred for the necessary care of Medi-Cal inpatients, that are an increase on a per-discharge basis over the prior fiscal period and are not listed under (b) as not being subject to an AAR.

(8) The interim rate as it may be affected by changes resulting from items appealed under (1) through (7) above.

(d) If a provider's cost based reimbursement (lower of Section 51546(a)(1) and (a)(2)) exceeds both the ARPDL and the PGRPDL, the providers' AAR and any subsequent appeal of the AA, must address both limitations in order to obtain relief for both limitations. If only the ARPDL is appealed, no further appeal rights will exist for the PGRPDL at any later date, except for an AAR on a tentative PIRL settlement that is issued later as a final PIRL settlement.

(e) The procedures for requesting an AA of an ARPDL shall be as follows:

(1) A request for an AA of the ARPDL or PGRPDL, which the Department deems acceptable, shall be submitted within 90 days after notification of that limitation. These AARs must be postmarked or hand delivered on or before the 90th day after the postmark on the settlement notification letter. No

extensions shall be granted. If a settlement letter from the Department contains settlements for more than one fiscal period, 120 days shall be allowed to file the AAR.

(2) The AAR shall be submitted in writing to the Department and shall specifically and clearly identify each issue, the total dollar amount involved for each issue and the dollar amount of overlap among each issue. If the Department determines that additional data are needed, the provider shall have 60 days after notification of the Department's request to supply it to the Department. No extension shall be granted.

(3) The AAR need not be formal, but it shall be in writing and specific as to each issue in dispute, setting forth the provider's specific contentions as to those issues and the estimated amount each issue involves. If the Department determines that the request for any issue fails to state the specific grounds upon which objection to the specific issue is based, including the estimated dollar amount involved, the provider shall be notified that is does not comply with the requirements of this regulation and the issue cannot be accepted. If an issue is not accepted on this basis, the provider may not submit this issue as a formal appeal.

(4) All AARs must be signed by an employee of the provider authorized by the provider to do so or by an authorized representative.

(A) If the AAR is signed by an authorized representative, a signed statement of such authorization for each FPE must accompany the AAR signed by an appropriate employee of the provider.

(B) Each AAR must have a declaration attesting to the validity of all statements contained in the AAR. The declaration shall be signed by an appropriate employee of the provider or an authorized representative.

(5) For each issue other than those covered by one of the specific formulas in this section the provider must demonstrate either (A), (B) or all parts of (C) below:

(A) Data that was incorrectly transferred as specified in Section 51550(b)(7).

(B) An error was made in the rate calculation.

(C) All costs for which additional reimbursement are being requested were:

1. Economically and efficiently provided for the necessary care of Medi-Cal inpatients.

2. Not already included in the ARPDL and/or PGRPDL, whichever limitation(s) is being appealed.

3. Not overlapped with any other AAR issue, or if there were, all such overlap must be used to reduce any additional reimbursement which would otherwise have been granted.

(6) The request shall contain all the appropriate data to allow the Department to determine if relief is needed and to do the relief calculation.

(A) This may include, but is not limited to:

1. All internal/external reports concerning each issue;

2. All material presented to the hospitals' Governing Board concerning this issue;

3. Medical records for Medi-Cal patients;

4. Bank statements and canceled checks;

5. All financial statements;

6. Copies of contracts.

7. Copies of proposed and/or actual budgets.

8. The provider's suggested calculation for relief (for each issue specifically listed under Section 51551 below, the formula in regulation must be used).

(B) All data submitted must be accompanied by one or more statements attesting that the data are true and correct signed by an individual with knowledge of the submitted data. More than one statement may be required if more than one data source is utilized.

(C) All data submitted may be audited by the Department.

(7) One-time relief may be granted for extraordinary and unusual events.

(A) The criteria for one-time relief is any item which occurred in one FPE and is not normally expected to apply to all future FPEs and therefore the ARPDL is not adjusted each future FPE for this issue.

(B) Formula relief shall only be granted for issues which are expected to carry on to every FPE.

(C) Relief for allowable increases in employee hours per discharge shall be one-time relief for the first two FPEs and then formula relief during the third FPE.

(8) The following steps are required by the Department for calculating relief:

(A) The provider shall clearly identify each issue and the estimated dollar amount of relief for each issue.

(B) The provider shall identify the specific cause of the increased costs.

(C) The provider shall calculate what reimbursement is already included in the ARPDL due to this issue (such as pass-throughs) and/or overlap from other AAR issues.

(D) The Department shall review the providers' figures on (A) and make any necessary corrections.

(E) The Department shall determine whether to grant one-time or formula relief.

(9) If data or other items requested by the Department for evaluation of an AAR are not supplied within 60 days, the Department shall suspend further consideration of this issue. If the requested data are not supplied within 120 days, the Department shall deem the AAR rejected for all issues for which the Department requested data or other items, and the provider shall be precluded from raising the issue(s) in a formal appeal.

(10) The provider shall be notified of the Department's decision in writing within 90 days of receipt of the provider's written request for an AA, or within 60 days of receipt of any additional documentation or clarification which was required by the Department, whichever is later. The request for an AA shall be deemed denied if no decision is issued within these time frames. The Department shall notify providers of such denials.

(11) A change in cost based reimbursable costs as defined in Section 51546(a)(1) and (a)(2), whether or not as a result of an audit appeals process, shall result in a redetermination of the PIRL, and shall not give rise to any additional appeal rights.

---

22 CCR § 51551. Specific Administrative Adjustment Issues

(a) AAs for year-to-year changes in case mix and/or outliers under the ARPD (not the PGRPD) shall be resolved in the following manner:

(1) The case mix adjustment factor (CMAF) shall be calculated using the following steps:

(A) The provider shall supply a listing for every Medi-Cal discharge that occurred during both the settlement fiscal period and the prior fiscal period, sorted in admission date order, and shall include as a minimum:

1. The patient's last name and first initial.

2. Medi-Cal I.D. Number.

3. The admission date.

4. The discharge date.

5. The principal diagnosis code.

6. The total amount of billed charges.

7. The DRG number.

8. The DRG weight. The same set of DRG groups and weights must be used for both settlement fiscal period and prior fiscal period data. If charges for a newborn were billed together with its mother, the newborn(s) and the mother must be listed separately on this listing, each with their own DRG and weight.

9. The sum of the cost weights and the number of Medi-Cal DRG discharges on the list. The number of Medi-Cal DRG discharges on the list must equal or exceed the number of audited Medi-Cal discharges. The listing must include all Medi-Cal patients, which includes newborns that are not counted as Medi-Cal discharges.

(B) The sum of the cost weights for each FPE shall be divided by their respective number of Medi-Cal discharges (not the number of patients in the listing) to obtain the average DRG weight for each fiscal period.

(C) The settlement fiscal period average DRG weight shall be divided by the prior fiscal period average DRG weight to obtain the CMAF.

(D) DRG cost weights used in this Section may be any set used by Medicare during any part of either the settlement or prior fiscal period.

The Department may also publish a set of Medi-Cal or California specific DRG cost weights, day outlier cutoffs and classifications as an option for the providers to use.

(E) Once a case mix adjustment index is granted, each subsequent fiscal period ARPDL shall include a CMAF (even if the adjustment is negative) and the provider shall supply all required data necessary to do the CMAF calculation to the Department within 9 months after the end of each subsequent FPE. Failure to do so will result in a 20 percent

reduction to the provider's current interim payments. If the data is not received within 12 months of the end of the FPE, the interim payment reduction shall be increased to 100 percent, resulting in an interim payment rate of zero percent. If a provider does not supply the data prior to the issuance of the final settlement, the CMAF shall be calculated so as to remove the affect of all previous CMAFs by compounding the previous CMAFs and applying the result to decrease the settlement fiscal periods ARPD. The provider shall not be eligible for a CMAF for any fiscal period. However, if the tentative PIRL settlement is issued within 6 months of the end of the FPE and the case mix data has not yet been supplied, then a CMAF of 1.0 shall be used for the tentative PIRL settlement only.

(F) For noncontract hospitals, the DRG weights shall be modified by one of the following two methods:

1. All DRG weights for all patients transferred to other acute care hospitals after being stabilized will be multiplied by 0.4 (a 60 percent reduction).

2. All DRG weights for patients transferred to other acute care hospitals after being stabilized shall be adjusted as follows:

a. For each patient transferred list the charges from the hospital they were transferred to.

b. Divide each patient's charges at the provider's hospital by the patient's total charges (which includes charges from both the hospital they were

transferred to and the hospital they were transferred from).

c. Multiply the result of (b) for each patient by their DRG weight to obtain a new weight to use in the CMAF calculation.

3. The provider shall choose which option it will use. If the provider fails to specify an option in their AAR, the Department shall use option 1.

4. Outlier calculations for these providers shall be adjusted by using the costs and days for the patients while they are at both providers, and using the same allocation formula 1-3 above.

(2) Additional reimbursement shall be granted to approximate a hospital's increases, on a per discharge basis, in the marginal cost of care beyond specified thresholds that are already reimbursed for in the ARPDL, including the CMAF. AARs for additional reimbursement due to outliers (both cost and day outliers) shall be determined as follows:

(A) If the provider has received a CMAF for the settlement fiscal period, then the outlier relief shall be calculated by:

1. The hospital shall also include on the listing required under (a)(1)(A) above the following additional items:

a. The length of stay for each patient.

b. The outlier cutoffs, in terms of both days and costs, as determined in accordance with Medicare

prospective payment rules and regulations for the applicable time period of each individual patient. However, whenever the Medicare formula uses a cost-to-charge ratio, the hospital specific cost-to-charge ratio shall be used. If the provider elects to use an alternative set of DRG weights published by the Department to calculate their CMAF, then the corresponding set of alternative outlier cutoffs must be used for each patient.

c. If a patient qualifies as a day outlier under the Medicare prospective payment definitions, or using the alternative cutoff when the alternative DRG weights are used, then the amount of allowable outlier payments shall also be listed. This amount shall be the MIRL divided by the number of Medi-Cal patient days, times 80 percent, multiplied by the number of days over the day outlier threshold for each patient.

d. For patients that do not qualify as a day outlier, but do qualify as a cost outlier, the amount of costs over the threshold shall be listed and shall be calculated as follows:

(1) The outlier cost cutoff shall be the greater of:

(A) A fixed dollar amount (adjusted for area wage levels) as defined in 42 CFR, Part 412.80(a)(ii)(A) for the appropriate service period.

(B) 1.5 multiplied by the ARPD multiplied by the DRG weight for the patient.

(2) The total costs for each patient shall be the overall Medi-Cal cost to charge ratio calculated from the cost report multiplied by the charges for each patient.

(3) The amount over the cost outlier thresholds, which is step (2) minus step (1), shall be multiplied by 0.80.

e. The cost to charge ratio is determined from the cost report for both the settlement and prior fiscal period.

2. If a patient qualifies as both a day and cost outlier, they shall be treated only as a day outlier.

3. Sum the amounts calculated in (2)(A)1.c. and d. above and divide by the respective number of Medi-Cal discharges for each FPE.

4. Relief shall be calculated by subtracting the prior fiscal period result of 3. from the settlement fiscal period result of 3.

5. Once an outlier adjustment, in conjunction with a CMAF, has been granted, it shall be included in all subsequent settlements even if it is a negative adjustment. Data necessary to do the outlier calculation shall be submitted each FPE within 9 months of the end of the FPE or current interim payments shall be reduced by 20 percent. If the data is not received within 12 months of the end of the FPE, the interim payments reduction shall be increased to 100 percent, resulting in an interim payment rate of zero percent.

(B) If a provider has not elected a case mix adjustment index, then relief for outliers shall be calculated as follows:

1. Providers shall provide lists containing the number of patients for every length of stay for both the settlement fiscal period and the prior fiscal period. For newborns not counted as separate Medi-Cal discharges, their days shall be added to their mother's.

2. The settlement fiscal period and prior fiscal period mean lengths of stay for all Medi-Cal patients shall be calculated by dividing total Medi-Cal patient days (including nursery days) by Medi-Cal discharges for each respective fiscal period.

3. Calculate the standard deviation of the length of stay for all patients in the prior fiscal period.

4. Compute 1.94 standard deviations of the mean length of stay in the prior fiscal period and add the result to the mean length of stay in the prior fiscal period.

5. Round the result in 4. above down to the next whole number to establish the outlier threshold to be used for both prior and settlement fiscal periods.

6. List the patients who exceeded the result of 5. above in either the settlement or prior fiscal period. Include in the list the patient's name, admission date, discharge date, length of stay and charges.

7. Calculate the amount of day outlier payments by:

a. Subtracting the result of 5. above from the length of stay of each patient whose stay exceeded the outlier threshold each FPE.

b. Sum the total days calculated in a. above for each FPE.

c. Divide the number from b. above by the number of Medi-Cal discharges in each respective FPE.

d. Subtract the prior fiscal period result of c. above from the settlement fiscal period result of c.

e. Multiply the result of d. above by the number of settlement fiscal period Medi-Cal discharges.

f. Calculate a per diem rate by dividing the settlement fiscal period MIRL by the total number of patient days (including newborn days).

g. Relief is calculated by multiplying the result of 7.e. above by the result of 7.f. above.

8. For patients who do not qualify as a day outlier, additional relief shall be provided as a cost outlier as follows:

a. For both the prior fiscal period and settlement fiscal period, the provider shall provide a listing of the number of patients by charge category (in either $ 100 or $ 200 increments) in order to calculate the mean and standard deviation.

b. Calculate the mean charge per discharge and standard deviation for both FPEs.

c. Convert the means and standard deviations to costs per discharge, by using the allowable cost to charge ratio from the cost report for each respective FPE.

d. Calculate the increase in the cost per discharge by dividing the settlement fiscal period mean cost per discharge by the prior fiscal period mean cost per discharge.

e. Calculate the prior fiscal period cost outlier cutoff by adding 1.94 standard deviations to the mean cost per discharge.

f. The prior fiscal period charge cutoff shall be the result of step e. above divided by the prior fiscal period allowable cost to charge ratio from the cost report.

g. Calculate the settlement fiscal period charge outlier cutoff by multiplying the results of d. above by the result of f.

h. For each FPE, list the following items for each Medi-Cal patient, in admission date order, over the charge threshold as calculated in g. above:

(1) Last name and first initial.

(2) Admission date.

(3) Length of stay.

(4) Charges.

(5) Amount of charges over the threshold.

(6) Costs over the threshold, which is (5) multiplied times the cost to charge ratio from the cost report. Enter zero in this column for any patient who is a day outlier.

i. Sum the items under (6) above for both the prior and settlement fiscal periods (separately).

j. Adjust prior fiscal period costs to settlement fiscal period costs by multiplying the prior fiscal period item i. above result times the result of d. above.

k. Divide the results of prior fiscal period j. above and settlement fiscal period j. above by the respective number of Medi-Cal discharges each FPE.

l. Subtract the prior fiscal period result of k. above from the settlement fiscal period result of k. above.

m. Multiply the result of l. above (minimum of zero) by the settlement fiscal period number of Medi-Cal discharges.

n. Add the result of m. above to the MIRL and divide by the settlement fiscal period net cost of covered services.

o. Multiply the lesser of the result of d. above or 1.0 by the result of n. above to calculate the additional amount of relief for cost outliers who do not

qualify as day outliers. This cannot exceed the amount of the MIRL liability.

(b) AAs for changes in labor costs shall be resolved in the following manner:

(1) Relief from the SWI and EBI can be granted if, and only if, the basis is due to labor/benefit cost increases per discharge resulting from either the new adherence to existing requirements imposed by government regulations, rules, and/or statutes or the adherence to new requirements imposed by government regulations, rules, and/or statues. This includes new rules and new adherence to rules imposed by the Joint Commission on Accreditation of Health Organizations. The adherence to the regulations, rules, and/or statutes must be necessary to legally render the provided services to Medi-Cal recipients.

(2) The Department will be authorized to grant relief if the provider meets the criteria for relief. Any relief granted shall be based upon an analysis of labor costs both prior and subsequent to the effective date of adherence to the requirements. Any request for relief will require the following:

(A) A summation of the governmental requirements necessitating the increase in labor costs;

(B) Additional hours and staff required to adhere to the governmental requirements. The request will specify:

1. The exact title(s) of the added staff;

2. The appropriate employee cost category; and

3. The number of hours and hourly rates for each added or deleted staff member.

(C) Source of the additional support, e.g., new hire or transferred from another employee classification; and

(D) The appropriate pages of the Medi-Cal cost report reflecting the additional costs associated with the increased hours.

(3) A separate request shall be rendered for each affected cost center. The cost centers for appeal purposes shall be the exact same cost centers as disclosed in the provider's Medi-Cal cost report as audited by the Department. Relief may be granted only for those cost centers that incurred the expenses as the result of governmental requirements.

(4) The Department shall evaluate the submitted data to determine any changes in the following areas for each affected cost center:

(A) Labor hours per discharge;

(B) Labor costs per discharge;

(C) Changes made in other employee classifications that resulted in labor cost increases or decreases.

(5) The unit measure of change shall be the ARPD. Any relief granted shall be on a per discharge basis by adjusting the ARPD to incorporate the

increased, if any, labor costs per discharge which were not reimbursed in the ARPD and which do not overlap with any other issues. Any adjustments necessitated by the application of relief shall impact the base rate per discharge and will be carried forward into future settlements.

(6) The only basis for relief under Subsection (b) of 51551 shall be:

(A) Increased employee hours per discharge; or

(B) The requirement to employ more expensive labor, e.g., replace Aides with Registered Nurses.

(7) Requests for relief on the basis of increased patient acuity will be deferred to Section 51551(a). Patient acuity or service intensity shall not be entertained under Section 51551(b).

(8) Relief sought on the basis of labor disputes shall not be granted. Labor disputes are inclusive of, but not limited to, strikes, arbitration, and/or labor issues where employees in an organized, collective, or unified movement refrained from physically reporting to perform their routine duties or physically reported but refrained from performing their routine duties.

(9) Relief shall not be granted under 51551(b) as the result of circumstances created when the provider switched to or from nursing services instead of salaried personnel.

(c) The following steps will be used for calculating relief for any ARPDL issues not otherwise specified in this regulation:

(1) The provider shall clearly identify the issue and estimated dollar amount of relief.

(2) The provider shall determine what is the specific underlying cause of the increased costs. If the underlying cause of the increased costs is not clearly stated, the AAR shall not be accepted by the Department.

(3) The provider shall calculate what reimbursement, if any, is already included in the ARPDL due to this issue (such as pass-throughs or case mix covering a new service) and shall also calculate any overlap between this and other AA issues.

(4) The Department shall review and correct if necessary, the provider's calculations in steps 1 through 3 above.

(5) The Department shall subtract any overlap with other issues from the amount determined in steps 1 through 3 above.

(6) The Department shall determine if relief is "one-time" or "formula."

22 CCR § 51552. AA Formal Appeals Process

(a) A provider may appeal the Department's decision on the AAR for a final PIRL settlement only. There shall be no appeal on an AAR for a tentative PIRL settlement. The appeal shall be filed and conducted in accordance with the applicable procedural requirements of Article 1.5, except as modified by this section, including the following:

(1) The appeal shall be submitted within 30 days after notification of the Department's decision on the AAR.

(2) The provider shall present its issues and evidence first at the hearing, as they shall have the burden of going forward.

(3) The provider has the burden of proof of demonstrating by a preponderance of the evidence, that the provider's position regarding disputed issues is correct.

(4) In order to demonstrate that it is entitled to relief from the PIRL and that the AA decision should be overturned, the provider has the burden of demonstrating by a preponderance of the evidence that the Department's AA decision is inconsistent with the applicable regulatory provisions and that the provider's alternative is consistent with the applicable regulatory provisions.

(5) If the Department's AA decision is proved, by a preponderance of evidence, inconsistent with the applicable regulatory provisions, and the provider has

not proved by a preponderance of the evidence that its position is consistent with the applicable regulatory provisions, then the Administrative Law Judge (ALJ) may fashion whatever relief is necessary to obtain consistency with the applicable regulatory provisions.

(6) Items that are not subject to an AA, as specified in Section 51551, shall not be subject to appeal.

(7) The provider shall be paid at the PIRL initially determined by the Department pending determination of a formal appeal.

(8) Any underpayments, identified in the appeal decision, shall be repaid to the provider, together with interest computed at the legal rate of interest beginning the later of the date the payment is received by the Department or the date the appeal is formally accepted by the Department.

(9) The evidence to be submitted by the provider at a formal appeal hearing that was not provided to the Department nor specifically and individually identified as available to the Department, during the AA process excluding oral testimony, must be submitted to the Department 30 days before the scheduled date of the hearing. The only exception, is when a hearing is scheduled within 45 days from the date notice is given. In this latter case, evidence must be submitted 15 days before the scheduled date of the hearing. Failure to submit this information

within the specified time frames shall result in its exclusion from the formal appeal hearing and record.

(10) Recalculation of the PIRL due to an appeal decision shall not give rise to any further appeal rights.

(11) If results of an audit appeal of the cost report or any prior fiscal period PIRL, AA or appeal, change data used in the settlement fiscal period PIRL, the PIRL shall be recalculated. The recalculation shall not give rise to further appeal rights.

(12) If an issue in an AAR is not accepted pursuant to Section 51550(e)(2) and (e)(3), the ALJ may only consider the evidence that was presented in the AAR and not any additional information or testimony. If the ALJ determines that the issue should have been accepted, the issue shall be remanded for a response to the merits.

(13) Only those issues that were clearly identified in a timely filed AAR, including an estimated dollar amount for each issue may be accepted as issues on a formal appeal.

---

22 CCR § 51553. Peer Grouping

(a) Hospital reimbursement shall, unless exempted from or modified by the provisions of this section, be payable at no more than the 60th percentile aligned ARPD of the peer group to which the hospital is assigned by the Department. This limit is

the Peer Group Rate Per Discharge Limitation (PGRPDL). The peer groups shall be based on a classification of hospitals as determined in the 1991 Hospital Peer Grouping Report published by the Department, that combines individual hospitals in a unit on the basis of similar or common characteristics. The following peer group classifications will be used:

(1) University Teaching Hospitals.

(2) Major (non-university) Teaching Hospitals.

(3) Large Teaching Emphasis Hospitals.

(4) Medium/Small Teaching Emphasis Hospitals.

(5) Extremely Large Sized Hospital.

(6) Large Sized Hospitals.

(7) Moderately Sized Hospitals.

(8) Medium Sized Hospitals.

(9) Moderately Small Sized Hospitals.

(10) Very Small Sized Hospitals.

(11) Acute Psychiatric Hospitals.

(12) Alcohol-Drug Rehabilitation Hospitals.

(13) Combination Psychiatric/Alcohol/Drug Rehabilitation Hospitals.

(14) Psychiatric Health Facilities.

(15) Psychiatric Teachering Hospitals.

(16) Psychiatric Children's Hospitals.

(17) Moderate Alcohol-Drug Rehabilitation Emphasis Hospitals.

(18) Moderate Psychiatric Emphasis Hospitals.

(19) State Hospital – Veterans Home.

(20) State Hospital – Mental Health.

(21) State Hospital – Developmental Services.

(22) Children's Hospitals.

(23) Crippled Children's Hospitals.

(24) Rehabilitation Hospitals.

(25) Large Rehabilitation Emphasis Hospitals.

(26) Respiratory Specialty Hospitals.

(27) Student Health Centers.

(28) Charitable Research Hospitals.

(29) Rural Hospitals.

(30) Specialty Teaching Hospitals.

(31) Prepaid Health Plan Hospitals.

(32) Prepaid Health Plan – Psychiatric/Alcohol-Drug Rehabilitation Hospitals.

(33) Prepaid Health Plan – Teaching Emphasis.

(34) Eye Hospitals.

(35) Women Hospitals.

(36) Dental/Outpatient Hospitals.

(b) The Department may review and change the number and definitions of peer groups and the peer group placement of individual providers.

(1) Providers shall be notified of all such reviews and resultant changes to the peer groups.

(2) For purposes of peer group placement, license beds shall be average licensed beds excluding any beds in suspense, in accordance with Section 1271.1 of the Health and Safety Code.

(3) All peer group assignments will be for all FPEs between July 1st and June 30th for each fiscal year.

(c) Providers exempted from application of the PGRPDL shall consist of new hospitals, rural hospitals, sole community hospitals, children's hospitals, crippled children's hospitals, charitable research hospitals, primary health service hospitals and hospitals in peer groups with less than five Medi-Cal providers.

(d) Providers with less than 15 Medi-Cal discharges in any FPE that covers over 360 days, shall be exempt from the PGRPDL for that FPE only.

(e) The peer group 60th percentile ARPD for each July 1-June 30 FPE shall be calculated by:

(1) Obtaining the ARPD for each provider for the FPE during the state's fiscal period (or use the

latest available if one is not yet available for the selected time period).

(2) Using actual or estimated rates of inflation, align the ARPD for each hospital to a July 1 to June 30 FPE.

(3) Locating the 60th percentile, by multiplying 0.6 times one more than the number of ARPDs in the peer group.

(4) Starting from the bottom of a list of ARPDs, ordered from the lowest ARPD at the bottom, up to the highest ARPD at the top, count up the number of ARPDs using the result of (3) above.

(5) Interpolate if necessary.

(f) The 60th percentile ARPD shall be updated quarterly.

(g) Once a final PIRL settlement is issued for a provider, the 60th percentile ARPD established in that provider's FPE shall not change, even though the final PIRL settlement may be reissued as a "recalculated final PIRL settlement" as a result of any appeal as well as other reasons for recalculation.

---

22 CCR § 51554. Peer Group Administrative Adjustments

(a) A provider may request an AA of the reimbursement limits specified in this section and their

peer group placement at the time of tentative and final PIRL settlement.

(1) The request shall be made within 90 days after notification of the reimbursement limits and shall be made in accordance with the procedures specified in Section 51550.

(2) The burden of proof shall be on the provider to prove that the additional reimbursement sought meets all of the requirements under Section 51550 and that except where a specific formula in Section 51555 exists, the provider's cost per discharge of the item being appealed, exceeds the 60th percentile cost per discharge of the item being appealed.

(3) In addition to the items listed under Section 51550(b), the following items shall not be subject to an AA of the PGRPDL:

(A) The use of hospital peer groups.

(B) The use of 60th percentiles and the methods used to compute them.

(C) Changes in case mix.

(D) Costs associated with strikes, other labor stoppages or slow downs.

(E) The addition of new services.

(F) Costs due to low occupancy.

(G) Difference in the type, nature, or scope of items or services available whether or not provided,

between the provider and other providers in its peer group since differences in the actual services needed to be rendered are accounted for in the CMA as specified in Section 51555.

(H) Any other issue that is not a difference between the provider and other providers in their peer group.

(4) A provider may appeal the Department's decision on the AA for final PIRL settlements only. The appeal shall be in accordance with Section 51552.

---

22 CCR § 51555. Peer Group Specific Administrative Adjustment Issue

(a) Differences in case mix (including outliers) between the provider and other providers in its peer group shall be determined for the PGRPDL using the following formula, but subject to reduction for overlapping issues as specified in Section (d) below:

MARD=PGL * CMA

Where: MARD=Maximum Allowable Rate per Discharge under the PGRPDL.

CMA=Case Mix Adjustment, which is the providers case mix index divided by the peer group 60th percentile case mix index.

PGL=Peer Grouping reimbursement Limit per discharge (60th percentile ARPD for the peer group if no adjustments have been made).

(1) Case mix indexes shall be based on DRGs and shall be computed using OSHPD patient discharge data for providers. Providers with an ARPD CMAF shall use data they are required to supply for the ARPD CMAF. However, the set of DRG weights used must be consistent for all providers in the peer group and shall be determined by the Department for each FPE.

(2) Providers shall be allowed to submit more accurate patient discharge data for their hospital. Any such patient discharge data must be submitted with the AAR. The data cannot be used until it is verified by the Department. The Department shall not accept data that it determines may not accurately reflect the provider's Medi-Cal patients.

(3) If OSHPD patient discharge data does not correspond with all provider's FPE, the closest FPE shall be used. Indices will be developed for a calendar year and for a July 1-June 30 FPE. The period which most closely corresponds to the providers FPE shall be used. Calendar year data shall be used for FPEs from October 1 through March 31 inclusive. July 1 through June 30 fiscal period data shall be used for all other FPEs.

(4) CMAs may be applied to any provider with a case mix index greater than the 60th percentile case mix index of its peer group.

(5) In addition to case mix relief, a provider shall be granted relief for outliers if the provider's outlier relief per discharge is greater than the computed

60th percentile outlier relief per discharge for all providers in the provider's peer group. The methodology used shall be as follows:

(A) Using OSHPD patient discharge data, and Medicare criteria for DRG outlier relief as specified in 42 CFR, Part 412, compute the total outlier relief for all providers in each peer group (using the same formula as listed in Section 51551-ARPD case mix and outliers). However, the cost outlier cutoff shall not vary within any one FPE worth of data.

(B) Convert the results under (1) above to outlier relief per-Medi-Cal discharge.

(C) Align the results of (B) above, in order from lowest at the bottom up to the highest at the top, and by counting up from the bottom to the n + 1 provider (n = # of providers in the peer group), compute the 60th percentile outlier relief per discharge for each peer group.

(D) If the requesting providers's outlier relief per discharge is greater than the 60th percentile outlier relief per discharge, the provider's MARD shall be increased by the difference of the two figures.

(6) These formulas shall be subject to the following limitations:

(A) Only those providers with 30 or more Medi-Cal discharges shall be included in the calculation of the 60th percentile outlier and case mix index per discharge. However, providers with under 30

Medi-Cal discharges may still receive relief using the formulas in this Section.

(B) Providers whose Medi-Cal discharge count per their OSHPD patient discharge data has more than a 50 percent variance from the appropriate Medi-Cal discharge figure from the cost report, after adjusting for well newborns who are included in the OSHPD patient discharge data but not counted as Medi-Cal discharges, shall be excluded from the 60th percentile calculation. Cost report figures shall be adjusted to estimate the calendar or fiscal period OSHPD data.

(C) If the provider requesting outlier relief has more than a 10 percent variance in Medi-Cal discharge figures (OSHPD patient discharge data vs. Medi-Cal cost report), or under 30 Medi-Cal discharges, the provider shall be required to submit its own data for use in the calculation. Such data must be for all Medi-Cal patients and include the patient's last name, ICD-9 primary diagnosis code, admission data, discharge date, DRG number, charges, patient's age, and OSHPD disposition code. The list shall be in admission date order.

(D) Providers may submit additional data to replace the OSHPD data. Any such data must be supplied with the AAR. Providers must supply a list in admission date order, containing each Medi-Cal patient's last name, ICD-9 code, admission date, discharge date, DRG number, charges, patient's age, and OSHPD disposition code.

(7) For noncontracting hospitals that do not keep a patient for the full episode of care, the CMA formula will be modified by one of the following formulas:

(A) Use only 40 percent of the appropriate DRG case mix weight for patients treated by noncontract hospitals, or

(B) 1. Track each patient's record to the contract hospital they were transferred to, and

2. Sum the charges from both providers, and

3. Apply the percent of total charges from the noncontract hospital to the DRG weight.

(b) Differences in labor costs, caused by factors such as differences in location, between the provider and other providers in its peer group shall be calculated using the following formula, subject to reduction for overlapping issues as specified in Section (d) below:

MARD = (LRCAF * WRR * PGL) + ((1-WRR) * PGL)

Where:

MARD = Maximum Allowable Rate Per Discharge under PGRPDL

LRCAF = Labor Related Cost Adjustment Factor, which is the minimum of (WI / PGWI), (HWR / PGWR) and (HWD / PGWD).

WRR = Wage Related Reimbursement Proportion of PGRPD (and ARPD) Reimbursement limitation for this hospital, which is: (TWRC / GOE) * (36LIMIT – %PASS * NETCOST)) / (36LIMIT *%NON).

PGL = Peer group limit, which is the 60th percentile ARPD.

WI = The wage and benefit index for the area in which the hospital is located.

PGWI = Peer group 60th percentile WI.

HWR = Hospital aligned wage and benefit rate per hour.

PGWR – Peer group 60th percentile HWR.

HWD = Hospital aligned wage related items per discharge.

PGWD = Peer Group 60th percentile HWD.

TWRC = Total wage related costs (sum of wages, benefits, and professional fees).

GOE = Gross operating expenses.

36LIMIT = Maximum reimbursement under MIRL (lesser of costs, charges, and the ARPD multiplied by the number of Medi-Cal discharges).

%PASS = Proportion of GOE which are pass throughs from Report E, Part II, Line 3.

NETCOST = The lesser of net cost of covered services and charges.

%NON = 1 –%PASS, which is the proportion of GOE which are not-pass-through costs.

NOTE: * = Multiplication

(1) The labor adjustment formula starts by determining the portion of the MIRL that was allowed for Wage Related Reimbursement (WRR). Only this amount is adjusted by the minimum of:

(A) A ratio based on an area (Metropolitan Statistical Area (MSA)) index developed by the Department of Health and Human Services, calculated using aligned average hourly rates for all hospital employees. The provider's area index is divided by the peer group 60th percentile wage index.

(B) A ratio based on comparing the provider's aligned hourly rate to the 60th percentile aligned hourly rate of the peer group.

(C) A ratio based on comparing the providers's aligned wage related items per discharge to the 60th percentile aligned wage related items per discharge for the peer group.

(2) The first ratio is calculated as follows:

(A) Use Medi-Cal cost report data to determine the statewide average employee composition among all employee classifications.

(B) Adjust the wage and benefit rates for each provider to the adjusted rate using the statewide distribution of employees.

(C) Align the adjusted wage and benefit rates for each provider using OSHPD disclosure data. The alignment factors shall be a Department estimate of increases in salary levels.

(D) Sum the adjusted wages and benefits for each MSA and statewide.

(E) Sum productive hours by MSA and statewide.

(F) Divide the sum of wages and benefits by the sum of productive hours for each MSA and the statewide totals.

(G) Divide each MSA average hourly wage rate (Step 4.) by the statewide average to obtain an MSA index.

(H) Assign the index for each MSA to all hospitals in the MSA.

(I) Determine the 60th percentile index for each Peer Group.

(J) Divide the hospital's area index by the 60th percentile index of its peer group.

(3) The second ratio (in (A)2. above) is calculated by:

(A) Total the wages and benefits for all employees for each provider.

(B) Divide (A) above by the corresponding total productive hours for each provider.

(C) The Department shall estimate increases in employee hourly wage and benefit costs, and align the data in (B) above to a common FPE for all providers.

(D) Align all of the results of (C) above ordered from lowest at the bottom to the highest at the top for each peer group.

(E) Count (0.6 * (n + 1)) places up from the bottom of the list in each peer group to find the 60th percentile.

1. N is the number of hourly rates in the peer group.

2. Interpolation will be used whenever (0.6 * (N + 1)) is not a whole number.

(4) The last ratio is calculated by:

(A) Total the wages and benefits for all employees for each provider.

(B) Using Department estimates of rates of increase in employee hourly wages and benefit costs, align the data in (A) above to a common FPE for all providers.

(C) Divide the result of (B) above by the number of total hospital discharges.

(D) For each peer group, order from lowest at the bottom to the highest at the top the results of (C) above.

(E) Count (.6 * (n + 1)) places up from the bottom of the list in each group to find the 60th percentile.

1. N is the number of wage and benefit rates per discharge in the peer group.

2. Interpolation will be used whenever (.6 * (n + 1)) is not a whole number.

(c) Differences in capital costs between the provider and other providers in its peer group shall be resolved using the method specified in this subsection. Approval by the OSHPD of a capital expenditure shall be evidence of the need for the capital expenditure; however, such approval shall not, per se, compel additional reimbursement. The following methods shall be used to calculate relief under this issue:

(1) Using data from the Medi-Cal cost report, compute relief by:

(A) Removing the 60th percentile capital cost per discharge from the 60th percentile allowable rate per discharge.

(B) Computing the allowable provider Medi-Cal capital expense per discharge subject to the limitations in (E) below, and

(C) Adding the result of (A) above the result of (B) above.

(D) The resulting figure from (C) above will be used in place of the 60th percentile rate per discharge,

but to avoid overlap with any other issue, this adjustment shall be made last.

(E) The result of (1)(B) above shall be subject to the following adjustments:

1. A hospital which has had a change of ownership (CHOW) on or after July 18, 1984 must submit data showing what its capital costs would have been had the CHOW not occurred except for any additional costs allowed under the Deficit Reduction Act of 1984. This capital cost amount shall be used when computing the provider's capital per discharge figure above.

2. If a provider has had its capital costs reduced by Medicare, the provider's capital expense per discharge (CEPD) shall be reduced by the Medicare capital cost reduction percentage.

The formula for relief would then be:

MPGRPD = (PGRPD – 60th percentile CEPD) + (X * hospital CEPD)

Where: X = 1 minus the Medicare payment reduction percentage

3. If a provider's capital expense per discharge is above the 60th percentile, it shall not be entitled to automatic relief. The provider must still prove that the capital expenses are necessary for the care of Medi-Cal patients.

(d) Providers which are eligible for any multiple adjustments under Sections 51554 through 51555

shall have relief computed using the following methodologies:

(1) For providers which are eligible for case mix, labor and capital adjustments, relief shall be computed as follows:

MPGRPD = MAX(CMA,LRCAF,MIN ((CMA*(WI/PGWI), (HWD/PGWD))) * WRR * PGRPD) + (CMA * (1 – CRC – WRR) * PGRPD) + CEPD

Where: CRC = Capital related cost percentage (CEPD/GOE)

MIN= Minimum of the items in parentheses

MAX= Maximum of the items in parentheses

If the provider's CEPD has been modified per Section 51555(c)(2), that revised figure shall be substituted into the formula above.

(2) For providers which are entitled to a CMA but whose capital and/or labor costs per discharge are below the 60th percentile, those cost components shall not be adjusted by the CMAF. The formula for relief shall be:

MPGRPD = ((PGRPD – 60th percentile CEPD – 60th percentile labor per discharge) * CMA) + hospital CEPD + hospital labor per discharge

(A) This formula shall be modified to remove only those costs (labor and/or capital) which are below the 60th percentile limit.

(B) A provider's reimbursement, pursuant to the above, shall not be adjusted below the 60th percentile rate per discharge.

(3) All other multiple adjustments shall have their overlapping relief calculated using the basic PGARPDL principles.

(e) Differences in costs between the provider and other providers in its peer group due to extraordinary events beyond the provider's control such as fire, earthquake, flood, or similar unusual occurrences with substantial cost effects shall be an appealable item;

(f) Differences in costs between the provider and other providers in its peer group caused by other items or circumstances affecting provider costs which meet all of the following criteria:

(1) The item is a difference, on a per discharge basis, between the hospital and the 60th percentile of the peer group.

(2) The item can be measured or estimated for all providers in the peer group.

(3) The costs were necessary for the provision of quality medical care to Medi-Cal beneficiaries.

(4) There is no overlap with other issues or the overlap can be measured.

(g) Relief for any issue shall be reduced for any overlap between issues.

(h) Any additional reimbursement granted pursuant to this section shall not result in a recalculation of the 60th percentile limit under Section 51553.

No. 10-283

In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General
**Counsel of Record*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5461
Fax: (415) 703-5480
Gregory.Brown@doj.ca.gov
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. The Court Should Review the First Question Presented 2

II. The Court Should Review the Second Question Presented 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Health and Soc. Servs. v. Ctrs. for Medicare and Medicaid Servs., 424 F.3d 931 (9th Cir. 2005) 10

Alexander v. Sandoval, 532 U.S. 275 (2001) 4

Ault v. Council of the City of San Rafael, 17 Cal. 2d 415 (1941) 6

BellSouth Telecomm., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270 (11th Cir. 2003) 5

Bio-Medical Applications of NC, Inc. v. Elec. Data Sys. Corp., 412 F.Supp.2d 549 (E.D.N.C. 2006) 5

Burlington United Methodist Family Servs., Inc. v. Athins, 227 F.Supp.2d 593 (S.D.W.Va. 2002) 5

Cal. Hosp. Ass'n v. Maxwell-Jolly, 188 Cal. App. 4th 559 (2010), *petition for review filed* (Cal. Oct. 19, 2010) 7

Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) 7, 10

Cort v. Ash, 422 U.S. 66 (1975) 5

Dennis v. Higgins, 498 U.S. 439 (1991) 4

Doe v. Chao, 540 U.S. 614 (2004) 4

TABLE OF AUTHORITIES – Continued

Page

Dominguez v. Schwarzenegger, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. Cal. Pharmacists Ass'n*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) 8, 9, 10

Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 5, 11

Exeter Mem'l Hosp. Ass'n v. Belshe, 145 F.3d 1106 (9th Cir. 1998) 12, 13

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 3, 4

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 1, 2, 3, 4

Hardt v. Reliance Standard Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149 (2010) 8

Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640 (11th Cir. 1990) 5, 6

Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) 12

Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 11

Minn. HomeCare Ass'n, Inc. v. Gomez, 108 F.3d 917 (8th Cir. 1997) 10, 11

Mission Hosp. Reg'l Med. Ctr. v. Shewry, 168 Cal. App. 4th 460 (2008) 7

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997) 7, 9, 11

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 4

People v. Olds, 3 Cal. 167 (1853) 6

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 6

Rite Aid of Pa., Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) 11

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 3, 5

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) 3, 6

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) 4

Wilderness Soc'y v. Kane County, 581 F.3d 1198 (10th Cir. 2009), *reh'g granted*, 595 F.3d 1119 (10th Cir. 2010) 3

Wyeth v. Levine, ___ U.S. ___, 129 S. Ct. 1187 (2009) 2, 9

STATUTES

42 U.S.C. § 1396a(a)(30)(A) ..... *passim*

42 U.S.C. § 1983 6

Cal. Civ. Proc. Code § 1085 ..... 6, 7

CONSTITUTIONAL PROVISIONS

Spending Clause 2, 4, 7

Supremacy Clause ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. Rep. No. 105-149 (1997).....4

REPLY BRIEF FOR PETITIONER

This petition raises the same questions posed in *Maxwell-Jolly v. Independent Living Center of Southern California (Independent Living)*, No. 09-958, and *Maxwell-Jolly v. California Pharmacists Association (California Pharmacists)*, No. 09-1158: (1) whether private parties may invoke the Supremacy Clause to enforce a Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), that does not meet the requirements for private enforcement identified in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and other cases; and (2) whether courts may enjoin state Medicaid reforms based on entirely atextual requirements.

The Court should review these issues, which are important, recurring, national in scope, and the subject of conflicting and erroneous decisions among the circuits. Respondents' arguments in opposition range from insubstantial to specious. The petitions in *Independent Living*, *California Pharmacists*, and this case all present excellent vehicles for review, and the present case presents the full panoply of requirements that the Ninth Circuit has now imposed.

On May 24, 2010, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Independent Living*, and the Court subsequently deconferenced the petition in *California Pharmacists* so that the Solicitor General may consider that case as well. The Court should, at minimum, hold the present case pending the Solicitor General's recommendation.

I. The Court Should Review the First Question Presented

The Court should review whether a private party may invoke the Supremacy Clause to enforce a Spending Clause statute that does not meet the requirements for private enforcement set forth in *Gonzaga*, 536 U.S. at 273, and other cases.

1. The Ninth Circuit's holding that the Supremacy Clause permits an end run around this Court's private-right-of-action jurisprudence is based on a misreading of this Court's precedents and leads to an absurd rule where, as respondents admit, "Congressional intent is not relevant" to determining whether a private right of action exists. Opp. 13. Indeed, under the Ninth Circuit's rule, plaintiffs always have a private right of action to enforce federal statutes *even where Congress specifically intended to preclude such enforcement*. This rule conflicts not only with the *Gonzaga* line of cases requiring Congress to unambiguously create private rights of action, but also with the well established rule that "the purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 1194 (2009).

2.a. Respondents argue that a Supremacy Clause exception to this Court's private-right-of-action jurisprudence is well established. Opp. 8-11. But this Court has not recognized such an exception; the courts of appeals are in conflict on this issue; and those circuits that have recognized this exception

have done so based on a misreading of this Court's precedents and are in conflict with *Gonzaga*, 536 U.S. at 280-86. Respondents' reliance on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), is misplaced, as *Shaw* merely held that federal courts have *jurisdiction* over preemption claims, a proposition that DHCS does not dispute. *See id.* at 96 n.14; *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002) (addressing only jurisdiction, and not private rights of action). Neither *Shaw* nor any of the additional cases cited by respondents (all of which predate *Gonzaga*) holds that the Supremacy Clause creates a private right of action that Congress itself did not intend to create. Opp. 9-10.

Justice Kennedy's dissent in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is not helpful to respondents. Justice Kennedy merely noted that a private party may assert preemption as an immunity defense to state regulation, but did not discuss, much less endorse, the notion that a private party may use the Supremacy Clause as a sword to force the state to spend more money. *Id.* at 118-19. That the "target" of a state regulatory effort may be able to "raise a preemptive defense in the form of a suit for injunctive or declaratory relief . . . does not mean that a third party can bring a freestanding preemption claim to enforce compliance with federal law, as if 'preemption' were a cause of action." *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1233 (10th Cir. 2009) (McConnell, J., dissenting), *reh'g granted*, 595 F.3d 1119 (10th Cir. 2010). Moreover, this case,

unlike *Golden State*, involves a Spending Clause provision, and accordingly falls under this Court's Spending Clause decisions, including *Gonzaga* and *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981), with the limitations on private enforcement recognized therein.

b. Respondents argue that Congress's intent "is irrelevant because the remedy in the instant case is supplied by the Supremacy Clause." Opp. 11. But "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress," and Congress's intent to create or preclude a private right and remedy "is determinative." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (the Supremacy Clause "is 'not a source of any federal rights'"); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) ("Congress rather than the courts controls the availability of remedies for violations of statutes.").

3. Respondents dispute evidence that Congress intended to preclude private suits challenging Medicaid rates when it repealed the Boren Amendment. Opp. 12-13. But the language in the relevant committee report is not limited to the repeal of Boren, but encompasses "any other provision of [§ 1396a]." H.R. Rep. No. 105-149, at 591 (1997). Contrary to respondents' assertion, *Doe v. Chao* does not hold that this type of legislative history is irrelevant, but only that it must be read in context and weighted appropriately. 540 U.S. 614, 626-27 (2004). Indeed,

numerous courts have cited this legislative history, along with the text and structure of the statute itself, in denying private efforts to enforce § 1396a(a)(30)(A).[1]

4.a. Respondents' efforts to distinguish *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990), are unavailing. Opp. 15-18. In *Pegues*, as here, a private party invoked the Supremacy Clause as its basis for asserting a private cause of action that had not been created by Congress. The Eleventh Circuit held that the Supremacy Clause does not create an implied cause of action, explaining that Congress creates statutory rights and obligations, and thus also determines "who may enforce them and in what manner." *Pegues*, 904 F.2d at 644. The court specifically cited *Cort v. Ash*, 422 U.S. 66 (1975), as supplying the criteria for determining whether Congress intended to create a private right of action. *Id.* at 644. And it rejected plaintiffs' efforts to misconstrue *Shaw* as doing more than identifying a jurisdictional basis for such claims. *Id.* at 643.

Nor does *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317

---

[1] *See, e.g.*, *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 929 n.26 (5th Cir. 2000), *overruled in part on different grounds, Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007); *Bio-Medical Applications of NC, Inc. v. Elec. Data Sys. Corp.*, 412 F.Supp.2d 549, 554-55 (E.D.N.C. 2006); *Burlington United Methodist Family Servs., Inc. v. Atkins*, 227 F.Supp.2d 593, 596 n.3 (S.D.W.Va. 2002).

F.3d 1270 (11th Cir. 2003), overrule (or even mention) *Pegues*. There, the court applied *Verizon* and simply held that there was jurisdiction over plaintiff's claim. *Id.* at 1278-79.

b. Respondents note that this Court has adjudicated claims by private parties asserting preemption without first addressing whether the plaintiffs had a private right of action. Opp. 17-18. But this does not mean (and this Court has not held) that no private right of action is required, or that the Supremacy Clause automatically creates one regardless of congressional intent, but rather that the issue is not jurisdictional and thus may be waived if it is not raised. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (noting that "[r]espondents have not advanced th[e] argument" that the plaintiffs lacked a private right of action). Indeed, this issue was neither raised nor addressed by the courts in *any* of the cases cited by respondents. Opp. 17-18.

5. Respondents' "vehicle" argument mischaracterizes mandamus law in California. Opp. 30-31. "A mandamus can give no right, ... although it may enforce one." *People v. Olds*, 3 Cal. 167, 175 (1853); *see also Ault v. Council of the City of San Rafael*, 17 Cal. 2d 415, 417 (1941) (mandamus "will be granted only when necessary to protect a substantial *right*") (emphasis added). While some intermediate state court of appeal decisions have allowed enforcement under California Code of Civil Procedure § 1085 of federal statutes that are not enforceable under § 1983, the

California Supreme Court has not reached this issue. Moreover, the cases allowing private enforcement of § 1396a(a)(30)(A) under § 1085 did so based on rights and duties created by the Ninth Circuit in the *Orthopaedic* line of cases that is the subject of this and the other two related petitions for certiorari. *See Cal. Hosp. Ass'n v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 573-78 (2010), *petition for review filed* (Cal. Oct. 19, 2010) (No. S186829) (following the *Orthopaedic* line of cases); *Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168 Cal. App. 4th 460, 473-74, 479-80 (2008) (same). Finally, § 1085 may be preempted if it is construed to permit private enforcement of § 1396a(a)(30)(A) in contravention of congressional intent.

II. The Court Should Review the Second Question Presented

The Court also should review whether a court may enjoin a state law as "preempted" based on purported requirements in a Spending Clause statute that neither Congress nor any federal agency created.

1. In a series of decisions beginning with *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the Ninth Circuit first created, and then dramatically expanded, an atextual requirement under § 1396a(a)(30)(A) that States must conduct a particular "study" before making reductions in Medicaid reimbursement rates. In *California Pharmacists*

Association v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), and *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. California Pharmacists Association*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), the Ninth Circuit added additional requirements as to *who* must conduct the study; *when* it must be conducted; and *what* the study must say.

In the present case, the Ninth Circuit expanded these requirements even further, robotically mandating a pre-enactment "study" even where (1) such a study would make no sense because the state statute expressly provides that rates are based on each individual hospital's costs, and that DHCS must study those costs, via an audit, prior to determining the hospital's final reimbursement; and (2) both pre- and post-implementation evidence conclusively shows that the rate reductions have not, and will not, negatively impact quality of care or access.

The Ninth Circuit's "study" requirement, and its ever-shifting permutations, are completely untethered from the text of the statute and accordingly "more closely resembl[e] 'invent[ing] a statute rather than interpret[ing] one.'" *Hardt v. Reliance Standard Life Ins. Co.*, ___ U.S. ___, 130 S. Ct. 2149, 2156 (2010). These requirements conflict with the holdings of the First, Third, Fifth, Seventh, and Eighth Circuits regarding § 1396a(a)(30)(A)'s requirements, and further conflict with this Court's precedents requiring

preemption to come from Congress, and not what is, in essence, a judge-made federal common law rule. *See Wyeth*, 129 S. Ct. at 1194-95.

2. Respondents contend that the Ninth Circuit's "study" requirements are not "atextual," but they cannot identify any text that supports them. Opp. 18-20. Section 1396a(a)(30)(A) states only that a "state plan" must provide "methods and procedures" to "assure that payments are consistent with efficiency, economy, and quality of care." 42 U.S.C. § 1396a(a)(30)(A). Nothing in the text or structure of § 1396a(a)(30)(A) requires a "study" or any particular type of "methods and procedures" for achieving these general goals. Indeed, several other "methods and procedures" for setting rates can achieve these goals at least as well as – and likely far better than – any "study," including setting wage rates through collective bargaining with provider unions (as in *Dominguez*), and setting rates based on each individual provider's audited allowable costs (as in this case). By rejecting such methods and requiring a "study" under all circumstances, the Ninth Circuit has created a purely judge-made rule.

Nor does the statutory text require that a "study" be conducted prior to enactment of any rate reductions, as the Ninth Circuit itself recognized when it permitted the rate reductions in *Orthopaedic* to be implemented while the State completed its study. *See Orthopaedic*, 103 F.3d at 1494. Nothing in the text or structure of § 1396a(a)(30)(A) precludes a state from meeting the statute's requirements by, for example,

auditing providers' reported costs at the time of the final "cost report settlement," App. 26, 31, 38; conducting ongoing "informal monitoring" of the effect of its rates, *see Minn. HomeCare Ass'n, Inc. v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997); or using any other reasonable "methods and procedures."

Respondents make no attempt to defend any of the Ninth Circuit's additional requirements, implicitly conceding that there is no statutory basis for them.

3. CMS has not interpreted § 1396a(a)(30)(A) to require a "study," much less to impose any of the additional atextual requirements that the Ninth Circuit added in *California Pharmacists*, *Dominguez*, and this case. Respondents' reliance on *Alaska Department of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931 (9th Cir. 2005), is misplaced. In *Alaska*, CMS disapproved a state plan amendment on the substantive ground that the rates were too high, noting that it viewed "the State's insistence that [providers] return to the State 90% of the increased federal payments" as an "implicit acknowledgment" that the existing rates were sufficient. 424 F.3d at 938. CMS did not state or imply that § 1396a(a)(30)(A) requires a "study" or imposes any particular procedural requirements. *Id.* at 937-38.

4. Respondents' argument that the district court "rejected" DHCS's evidence is incorrect and misconstrues the issue presented. Opp. 22-25. This petition

raises pure questions of law concerning the Ninth Circuit's atextual interpretation of § 1396a(a)(30)(A), and neither the district court nor the Ninth Circuit decision turned on any findings of fact. App. 1-4, 9-24.

5. Respondents' assertion that the Ninth Circuit's "study" requirement does not conflict with other circuits is demonstrably false. Opp. 25-28. Indeed, the Ninth Circuit's judicially created requirements conflict with *every other circuit that has considered this issue* – specifically, the First, Third, Fifth, Seventh, and Eighth Circuits. Pet. 24-25.

Respondents' efforts to distinguish these other circuits' decisions are unavailing. The Eighth Circuit's holding that no study is required under § 1396a(a)(30)(A) expressly applies to any "setting or changing [of] payment rates," and does not draw a distinction between rate increases and decreases. *Minn. HomeCare*, 108 F.3d at 918. The Third Circuit specifically discussed and rejected the Ninth Circuit's "study" requirement under *Orthopaedic*, holding that "section 30(A) requires the state to achieve a certain result but does not impose any particular method or process for getting to that result." *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999). Respondents argue that the Fifth and Seventh Circuit decisions concerned only the "equal access" provision of § 1396a(a)(30)(A), but those courts' analyses did not turn on which provision plaintiffs were trying to enforce. *See Evergreen Presbyterian Ministries*, 235 F.3d at 933 n.33 (noting that "studies" are "not required by the language of section 30(A)"); *Methodist*

Hosps., Inc. v. Sullivan, 91 F.3d 1026, 1030 (7th Cir. 1996) ("Nothing in the language of § 1396a(a)(30), or any implementing regulation, requires a state to conduct studies."). And the First Circuit analyzed § 1396a(a)(30)(A) in detail, recognizing that its provisions are "highly general and potentially in tension," and that the statute requires only "state plans" with "'methods and procedures' to achieve these general ends." *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).

6.a. Respondents' "vehicle" arguments are unavailing. Opp. 28-31. The interlocutory nature of the preliminary injunction order is no impediment, as the petition presents pure questions of law that are of national importance. The Ninth Circuit's erroneous interpretation of § 1396a(a)(30)(A) is now settled law in that circuit (as evidenced by the court of appeals' unpublished decision in this case, App. 1-4), and California and other States should not have to continue to defend against private challenges to their Medicaid programs for another year or longer when the Ninth Circuit's governing legal principles have been firmly established.

b. Respondents argue that CMS must approve any rate changes before they can be implemented. Opp. 28-29. But the Ninth Circuit did not reach that issue; no statute or regulation requires such preapproval; and it has long been CMS's practice to permit California to implement rate changes while its state plan amendments (SPA) are pending before CMS. Respondents' reliance on *Exeter Memorial*

Hospital Association v. Belshe, 145 F.3d 1106 (9th Cir. 1998), is misplaced, as *Exeter*'s pre-approval requirement was based on the specific language of the now-repealed Boren Amendment. *Id.* at 1107-09.

c. The pending administrative proceedings to review California's proposed SPA further support review. This petition contends, after all, that private parties should not be able to interject the courts into Medicaid ratemaking before CMS has discharged its duties. The CMS letter to which respondents cite confirms the highly technical and in-depth nature of CMS's review – one that no court has the expertise or resources to replicate. DHCS has not "stalled" the approval process, which is "off the clock" by agreement with the agency, but is actively coordinating its responses with the agency. While respondents have opinions regarding the State's compliance with the Medicaid Act, Congress entrusted oversight of California's $40 billion Medicaid program to HHS/CMS, not to respondents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 5, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General

**Counsel of Record*
Counsel for Petitioner

Supreme Court, U.S.
FILED
MAY 19 2011
OFFICE OF THE CLERK

Nos. 09-958, 09-1158, and 10-283

AND
BRIEFS

In the Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
KARIN S. SCHWARTZ*
Supervising Deputy
Attorney General
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email:Karin.Schwartz@doj.ca.gov
Counsel of Record
Counsel for Petitioners

LYNN S. CARMAN*
MEDICAID DEFENSE FUND
8 Waterbury Lane
Novato, CA 94949
Telephone: (415) 927-4023
Fax: (415) 499-1687
Email:lynnscarman@hotmail.com
Counsel of Record

Counsel for Respondents Independent Living Center of Southern California, Inc., a nonprofit corporation, et al., in Case Nos. 09-958 & 09-1158

[All Counsel Listed On Inside Cover]

Petitions for Certiorari Filed February 16, 2010 (No. 09-958); March 24, 2010 (No. 09-1158); and August 25, 2010 (No. 10-283)
Certiorari Granted January 18, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
SUSAN M. CARSON
JENNIFER M. KIM
Supervising Deputy Attorneys General
GREGORY D. BROWN
CARMEN D. SNUGGS
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email:Karin.Schwartz@doj.ca.gov
**Counsel of Record*
Counsel for Petitioners

Of counsel for Petitioners:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010

LYNN S. CARMAN*
MEDICAID DEFENSE FUND
8 Waterbury Lane
Novato, CA 94949
Telephone: (415) 927-4023
Fax: (415) 499-1687
Email:lynnscarman@hotmail.com

STANLEY L. FRIEDMAN
445 S. Figueroa Street, 27th Floor
Los Angeles, CA 90071
Telephone: (213) 629-1500
Fax: (213) 489-6899
Email:friedman@friedmanlaw.org

ROCHELLE BOBROFF
NATIONAL SENIOR CITIZENS LAW CENTER
1444 Eye Street, NW
Washington, DC 20005
Telephone: (202) 289-6976
Fax: (202) 289-7224
Email:rbobroff@nsclc.org

Counsel of Record

Case Nos. 09-958 & 09-1158:
Counsel for Respondents
Independent Living Center of
Southern California, Inc.,
a nonprofit corporation, et al.

DEANNE E. MAYNARD*
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW, Suite 6000
Washington, DC 20006
Telephone: (202) 887-1500
Fax: (202) 887-0763
Email:dmaynard@mofo.com

CRAIG J. CANNIZZO
LLOYD A. BOOKMAN
JORDAN B. KEVILLE
FELICIA Y SZE
HOOPER, LUNDY & BOOKMAN, INC.
1875 Century Park East, Suite 1600
Los Angeles, CA 90067
Telephone: (310) 551-8111
Fax: (310) 551-8181
Email:ccannizzo@health-law.com

*Counsel of Record

Case No. 09-958:
Counsel for Respondents
Sacramento Family Medical Clinics, Inc., et al.

Case No. 09-1158:
Counsel for Respondents
California Hospital Association, et al.

STEPHEN P. BERZON*
SCOTT A. KRONLAND
STACEY M. LEYTON
MATTHEW J. MURRAY
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Fax: (415) 362-8064
Email:sberzon@altshulerberzon.com

*Counsel of Record

Case No. 09-1158:
Counsel for Respondents
Lydia Dominguez, et al.

MICHAEL S. SORGEN*
LAW OFFICES OF MICHAEL S. SORGEN
240 Stockton Street, Ninth Floor
San Francisco, CA 94108
Telephone: (415) 956-1360
Fax: (415) 956-6342
Email:msorgen@sorgen.net

DEAN L. JOHNSON
DEAN L. JOHNSON, INC.
6863 Tanzanite Drive
Carlsbad, CA 92009
Telephone: (760) 603-0022
Fax: (866) 373-9348
Email:deanl.johnson@gmail.com

CARTER G. PHILLIPS
ERIC A. SHUMSKY
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: (202) 736-8270
Fax: (202) 736-8711
Email:cphillips@sidley.com

**Counsel of Record*

Case No. 10-283:
Counsel for Respondents
Santa Rosa Memorial Hospital, et al.

TABLE OF CONTENTS

Page

Relevant Docket Entries in the United States District Court for the Central District of California, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. CV 08-3315 CAS (MANx).....1

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-56422 18

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-56554 28

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-57016 36

Relevant Docket Entries in the United States District Court for the Central District of California, *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, No. CV 09-382 CAS (MANx) 39

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, No. 09-55692 45

Relevant Docket Entries in the United States District Court for the Central District of California, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. CV 09-722 CAS (MANx).....48

TABLE OF CONTENTS – Continued

Page

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55365 56

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55532 62

Relevant Docket Entries in the United States District Court for the Northern District of California, *Dominguez v. Schwarzenegger*, No. CV 09-2306 CW 64

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Dominguez v. Schwarzenegger*, No. 09-16359 68

Relevant Docket Entries in the United States District Court for the Northern District of California, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC 71

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. 09-17633 78

Respondents' Notice of Removal of Action Under 42 U.S.C. § 1441(b) (consisting of pages 1-4 only, of 7 pages), together with Exhibit D: the Verified First Amended Petition for Writ of Mandamus, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. May 19, 2008) 80

TABLE OF CONTENTS – Continued

Page

Order Denying Petitioners' Motion for a Preliminary Injunction, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. June 25, 2008) 125

Complaint, *Managed Pharmacy Care v. Maxwell-Jolly*, No. CV 09-382 CAS (MANx) (C.D. Cal. Jan. 16, 2009) 140

Order Denying Application for an Order to Show Cause; Clarifying Preliminary Injunction, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Dec. 10, 2009) 153

Order of the Supreme Court of the United States Granting Certiorari (Jan. 18, 2011) 156

The following opinions, decisions, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari in *Douglas v. Independent Living Center of Southern California*, No. 09-958:

Order Granting in Part and Denying in Part Petitioners' Motion for Preliminary Injunction, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. Aug. 18, 2008) 94a

Civil Minutes – General, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. Aug. 27, 2008) 125a

TABLE OF CONTENTS – Continued

Page

Civil Minutes – General, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. Sept. 15, 2008) 127a

Order Granting Petitioners' Third Motion for Preliminary Injunction, *Indep. Living Ctr. of S. Cal. v. Shewry*, No. CV 08-3315 CAS (MANx) (C.D. Cal. Nov. 17, 2008) 133a

Opinion, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-56061 (9th Cir. Sept. 17, 2008) 58a

Opinion, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, Nos. 08-56422, 56554 (9th Cir. July 9, 2009) 1a

Order, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, Nos. 08-56422, 56554 (9th Cir. Oct. 29, 2009) 154a

Order, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, Nos. 08-56422, 56554 (9th Cir. Dec. 21, 2009) 41a

Order, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, Nos. 08-56422, 56554 (9th Cir. Jan. 6, 2010) 52a

Memorandum, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-57016 (9th Cir. Aug. 7, 2009) 54a

Order, *Indep. Living Ctr. of S. Cal. v. Maxwell-Jolly*, No. 08-57016 (9th Cir. Sept. 23, 2009) 157a

TABLE OF CONTENTS – Continued

Page

The following opinions, decisions, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari in *Douglas v. California Pharmacists Association*, No. 09-1158:

Order Granting Plaintiff's Motion for Preliminary Injunction, *Managed Pharmacy Care v. Maxwell-Jolly*, No. CV 09-382 CAS (MANx) (C.D. Cal. Feb. 27, 2009) 128a

Civil Minutes – General, *Managed Pharmacy Care v. Maxwell-Jolly*, No. CV 09-382 CAS (MANx) (C.D. Cal. Apr. 3, 2009) 152a

Memorandum, *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, No. 09-55692 (9th Cir. Mar. 3, 2010) 53a

Order Denying Plaintiffs' Motion for Preliminary Injunction as to Hospitals, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. CV 09-722 CAS (MANx) (C.D. Cal. Mar. 9, 2009) 106a

Order Granting Plaintiffs' Motion for Preliminary Injunction as to Adult Day Health Centers, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. CV 09-722 CAS (MANx) (C.D. Cal. Mar. 9, 2009) 84a

Memorandum, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55365 (9th Cir. Mar. 3, 2010) 37a

TABLE OF CONTENTS – Continued

Page

Order, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55365 (9th Cir. Apr. 6, 2009) 42a

Order, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55365 (9th Cir. Aug. 24, 2009) 52a

Opinion, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, No. 09-55532 (9th Cir. Mar. 3, 2010) 1a

Order Granting Plaintiffs' Motion for a Preliminary Injunction, *Martinez v. Schwarzenegger*, No. C 09-02306 CW (N.D. Cal. June 26, 2009) 161a

Preliminary Injunction, *Martinez v. Schwarzenegger*, No. C 09-02306 CW (N.D. Cal. June 26, 2009) 176a

Amended Preliminary Injunction, *Martinez v. Schwarzenegger*, No. C 09-02306 CW (N.D. Cal. July 13, 2009) 178a

Order Further Clarifying Injunction, *Martinez v. Schwarzenegger*, No. C 09-02306 CW (N.D. Cal. July 24, 2009) 180a

Opinion, *Dominguez v. Schwarzenegger*, No. 09-16369 (9th Cir. Mar. 3, 2010) 59a

TABLE OF CONTENTS – Continued

Page

The following opinions, decisions, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari in *Douglas v. Santa Rosa Memorial Hospital*, No. 10-283:

Order Granting Amended Motion and Preliminary Injunction, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Nov. 18, 2009) 9a

Order Staying Preliminary Injunction and Case, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Nov. 19, 2009) 7a

Order Vacating Stay of Preliminary Injunction, and Restoring Preliminary Injunction; Staying Case, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. CV 08-5173 SC (N.D. Cal. Dec. 2, 2009) 5a

Memorandum, *Santa Rosa Mem. Hosp. v. Maxwell-Jolly*, No. 09-17633 (9th Cir. May 27, 2010) 1a

Relevant Docket Entries in the United States District Court for the Central District of California, *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, No. CV 08-3315 CAS (MANx)

5/19/2008	1	NOTICE OF REMOVAL from Superior Court of the State of California for the County of Los Angeles, case number BS114459 with conformed copy of summon and verified petition for writ of mandamus. Case assigned to Judge Christina A. Snyder, Discovery to Magistrate Judge Margaret A Nagle. (Filing fee $350 PAID.), filed by respondents Sandra Shewry, California Department of Health Care Services.(ghap) (Additional attachment(s) added on 5/29/2008: # 1 Exhibits A – E, # 2 Exhibit F) (ds). (Additional attachment(s) added on 5/29/2008: # 3 Notice of Assignment, # 4 Civil Cover Sheet) (ds). (Entered: 05/23/2008)
5/28/2008	6	NOTICE OF LODGING filed of Conformed Filed Verified First Amended Petition for Writ of Mandamus re Notice of Removal, 1 (Carman, Lynn) (Entered: 05/28/2008)
5/30/2008	10	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: federal preempted 10% Medicaid payment cuts filed by Plaintiff [Independent Living Center of Southern California, et al.]. Motion set for

		hearing on 6/23/2008 at 10:00 AM before Judge Christina A. Snyder. (Carman, Lynn) (Entered: 05/30/2008)
5/30/2008	11	MEMORANDUM in Support of MOTION for Preliminary Injunction re: federal preempted 10% Medicaid payment cuts 10 filed by Petitioners [Independent Living Center of Southern California, et al.]. (Carman, Lynn) (Entered: 05/30/2008)
6/1/2008	12	NOTICE OF DISMISSAL filed by Petitioner [Independent Living Center of Southern California, et al.,] pursuant to FRCP 41a(1) Without Prejudice as to California Department of Health Care Services. (Carman, Lynn) (Entered: 06/01/2008)
6/2/2008	29	NOTICE OF LODGING filed Proposed Order re MOTION for Preliminary Injunction re: federal preempted 10% Medicaid payment cuts 10 (Attachments: # 1 Exhibit, # 2 Document) (Friedman, Stanley) (Entered: 06/02/2008)
6/12/2008	35	MEMORANDUM in Opposition to MOTION for Preliminary Injunction re: federal preempted 10% Medicaid payment cuts 10 filed by Respondents Sandra Shewry, California Department of Health Care Services. (Attachments: * * *) (Ugaz, Sara) (Entered: 06/12/2008)

6/16/2008	43	REPLY IN SUPPORT OF MOTION for Preliminary Injunction re: federal preempted 10% Medicaid payment cuts 10 FOR 6/23/08 HEARING filed by Petitioners [Independent Living Center of Southern California, et al.]. (Carman, Lynn) (Entered: 06/16/2008)
6/23/2008	46	MINUTES OF Motion Hearing on Petitioner's Motion for Preliminary Injunction 10 held before Judge Christina A. Snyder. The Court takes petitioner's motion under submission. The Court will issue a final order. Court Reporter: Laura Elias. (cj) (Entered: 06/23/2008)
6/25/2008	47	ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION by Judge Christina A. Snyder: The Court hereby DENIES Petitioners' Motion for Preliminary Injunction 10. See document for details. (gk) (Entered: 06/25/2008)
6/26/2008	48	NOTICE OF APPEAL to the 9th CCA filed by Petitioners [Independent Living Center of Southern California, et al.]. Appeal of Order 47 FEE NOT PAID. (Attachments: # 1 Civil Appeals Docketing Statement) (Friedman, Stanley) (Entered: 06/26/2008)
7/11/2008	64	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of

Appeals, 48 filed by [Independent Living Center of Southern California, et al.], CCA # 08-56061. The district court's order denying appellants' motion for a preliminary injunction is vacated and we remand for further proceedings. We also temporarily enjoin appellee from implementing A.B. 5's ten percent reduction in the reimbursement rate for prescription drugs, until August 11, 2008. If the district court has not ruled by then on appellants' motion for preliminary injunction, appellants may seek further temporary relief from this court. An Opinion will follow. Order received in this district on 7/11/08. (car) (Entered: 07/15/2008)

7/16/2008 66 ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 48 filed by [Independent Living Center of Southern California, et al.], CCA # 08-56061. Because of the urgency of the district court's conducting the preliminary injunction hearing on the merits, this order directs the clerk to issue the mandate forwith [sic]. We delete from the order, however, the second and third sentences of the final paragraph that relate to the issuance of the stay; the two sentences commence with "We also" and end with "form [sic] this court." The

		panel retains jurisdiction over the stay request and will reconsider the question of a stay [in] light of the motion for reconsideration filed by the appellees. An order as to the stay will issue subsequently. Order received in this district on 7/16/08. (car) (Entered: 07/18/2008)
7/16/2008	68	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 48, CCA # 08-56061. Order denying appellants' motion for a preliminary injunction order is vacated and remand for further proceedings. Mandate received in this district on 7/16/08. (lr) (Entered: 07/22/2008)
7/25/2008	74	MEMORANDUM in Support Preliminary Injunction filed by Petitioners [Independent Living Center of Southern California, et al.]. (Carman, Lynn) (Entered: 07/25/2008)
7/25/2008	82	ORDER GRANTING AARP'S EX PARTE APPLICATION TO FILE AMICUS CURIAE BRIEF by Judge Christina A. Snyder: Ordered that AARP's Application for Amicus Status 80 is GRANTED. The Court grants AARP amicus status. IT IS FURTHER ORDERED that AARP's amicus curiae proposed brief lodged with the Court on 7/24/2008 is deemed filed as of the date of this Order. (gk) (Entered: 07/28/2008)

7/25/2008	83	Amicus Curiae Brief of AARP in Support of Petitioners filed by Amicus AARP. (gk) (Entered: 07/28/2008)
7/30/2008	95	MEMORANDUM in Opposition to Petitioners' Supplemental Motion for Preliminary Injunction filed by Respondent Sandra Shewry. (Snuggs, Carmen) (Entered: 07/30/2008)
7/31/2008	101	REPLY support of motion REQUEST for Preliminary Injunction re: Request for Judicial Notice 73 filed by Petitioners [Independent Living Center of Southern California, et al.], Respondent Sandra Shewry. (Friedman, Stanley) (Entered: 07/31/2008)
8/3/2008	106	NOTICE Voluntary Dismissal, Without Prejudice, of Third Cause of Action and Fourth Cause of Action filed by Petitioners [Independent Living Center of Southern California, et al.]. Pursuant to Federal Rule of Civil Procedure 41(a)(1) (Friedman, Stanley) (Entered: 08/03/2008)
8/18/2008	121	ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS MOTION FOR PRELIMINARY INJUNCTION by Judge Christina A. Snyder. Denying the parties' various motions to strike as moot. 98 73 99 120. (rmo) (Entered: 08/19/2008)
8/26/2008	127	NOTICE OF APPEAL to the 9th CCA filed by Respondent Sandra

Shewry. Appeal of Preliminary Injunction, Order 121 FEE BILLED. (Ugaz, Sara) Modified on 8/27/2008 (dmap). (Entered: 08/26/2008)

8/27/2008 132 NOTICE OF MOTION AND First MOTION to Alter Judgment re Preliminary Injunction, Order 121. filed by Respondent SANDRA SHEWRY Sandra Shewry. Motion set for hearing on 9/22/2008 at 10:00 AM before Judge Christina A. Snyder. (Attachments: * * *) (Snuggs, Carmen) (Entered: 08/27/2008)

8/27/2008 135 ORDER by Judge Christina A. Snyder, Modifying Preliminary Injunction. 121 132. (rmo) ** ORDER VACATED PURSUANT TO CIVIL MINUTES OF 1/22/2010 323 ** Modified on 1/25/2010 (gk). (Entered: 08/29/2008)

8/29/2008 151 MOTION to Intervene Pursuant to Federal Rule of Civil Procedure 24 and for Leave to File Brief in Opposition to Motion to Alter or Amend filed by Proposed Petitioners in Intervention Sacramento Family Medical Clinics, Inc., Theodore M. Mazer, M.D., Eastern Plumas Health Care District, Pioneers Memorial Health Care Distirct, Kaweah Delta Health Care District, Ronald B. Mead, D.D.S. and Acacia Adult Day Services. Motion set for hearing on 9/22/2008 at 10:00 AM before Judge Christina A. Snyder. (gk) (Entered: 09/09/2008)

8/29/2008	152	MEMORANDUM of Points and Authorities in Support of Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24 151 filed by Proposed Intervenors Sacramento Family Medical Clinics, Inc., Theodore M. Mazer, M.D., Eastern Plumas Health Care District, Pioneers Memorial Health Care District, Kaweah Delta Health Care District, Ronald B. Mead, D.D.S. and Acacia Adult Day Services. (gk) (Entered: 09/09/2008)
9/7/2008	147	Opposition to re: First MOTION to Alter Judgment re Preliminary Injunction, Order 121 .First MOTION to Alter Judgment re Preliminary Injunction, Order 121 . 132 filed by Petitioners [Independent Living Center of Southern California, et al.]. (Attachments: * * *) (Friedman, Stanley) (Entered: 09/07/2008)
9/11/2008	165	REPLY to Petitioners' Opposition to First MOTION to Alter Judgment re Preliminary Injunction, Order 121 .First MOTION to Alter Judgment re Preliminary Injunction, Order 121 . 132 filed by Respondent Sandra Shewry. (Snuggs, Carmen) (Entered: 09/11/2008)
9/15/2008	174	MINUTES OF Motion Hearing held before Judge Christina A. Snyder RE: Proposed Intervenors Motion to Intervene 151: A hearing was held on September 15, 2008. After carefully

		considering the arguments set forth by the parties, the Court finds and concludes as follows. The Court GRANTS the motion to intervene as to proposed intervenors Sacramento Family Medical Clinics, Inc.; Theodore M. Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services. The Court DENIES the motion to intervene as to proposed intervenors Eastern Plumas Health Care District, Pioneers Memorial Health Care District, and Kaweah Delta Health Care District. Refer to document for details of the Order. Court Reporter: Laura Elias. (pso) (Entered: 09/17/2008)
9/15/2008	175	MINUTES OF Motion Hearing held before Judge Christina A. Snyder RE: Respondents Motion to Alter or Amend, and Clarify Order Granting in Part Petitioners Motion for Preliminary Injunction 132. The Court denies respondents request to clarify, alter, or amend the order with regard to clinics, as the record does contain evidence of the effect of the ten percent rate reduction for clinics, and the term clinic is not ambiguous. Refer to document for details of the Order. O[bj]ections 166 and 170 finding as moot. Court Reporter: Laura Elias. (pso) (Entered: 09/17/2008)

9/15/2008	177	NOTICE OF PRELIMINARY INJU[NC]TION APPEAL to the 9th CCA filed by petitioners Tran Pharmacy, Inc., Jason Young. Appeal of Order 135, Preliminary Injunction, Order 121 Filed On: 08/18/2008; Entered On: 08/19/2008; Filing fee $455, PAID; RECEIPT NUMBER: 111271. cc: Lynn S. Carman; Edmund G. Brown, Jr. (dmap) (Entered: 09/18/2008)
9/15/2008	180	NOTICE OF PRELIMIN[A]RY INJUNCTION APPEAL to the 9th CCA filed by Petitioners [Independent Living Center of Southern California, et al.]. Appeal of Order 135, Filed On: 8/27/08; Entered On: 8/29/08; Preliminary Injunction, Order 121 Filed On: 8/18/08; Entered On: 8/19/08; Filing fee $455, Paid. receipt number 111270. cc: Lynn S. Carman; Edmund G. Brown, Jr. (lr) (Entered: 09/18/2008)
9/15/2008	368	COMPLAINT IN INTERVENTION against Respondent Sandra Shewry, Director of the Department of Health Care Services of the State of California, filed by Intervenors Sacramento Family Medical Clinics, Inc., Theodore M. Mazer, M.D., Eastern Plumas Health Care District, Pioneers Memorial Health Care District, Kaweah Delta Health Care District, Ronald B. Mead, D.D.S.,

and Acacia Adult Day Services. (gk) (Entered: 05/25/2010)

9/17/2008 183 ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 48 filed by [Independent Living Center of Southern California, et al.], CCA # 08-56061. We hereby recall the mandate in this case so that we may file an opinion further describing our order of July 11, 2008, and address any additional petitions for panel rehearing or rehearing en banc. (cbr) (Entered: 09/19/2008)

10/2/2008 191 FIRST AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by Respondent Sandra Shewry. Amending Notice of Appeal to 9th Circuit Court of Appeals 127 Filed On: 08/26/08; Entered On: 08/26/08; (Kim, Jennifer) (Entered: 10/02/2008)

10/16/2008 200 AMENDED NOTICE OF APPEAL to the 9th CCA [Independent Living Center of Southern California, et al.]. (Friedman, Stanley) Modified on 11/19/2008 (lr). (Entered: 10/16/2008)

10/27/2008 215 NOTICE OF MOTION AND MOTION for Preliminary Injunction re: ENJOIN AB 5 RATE CUT FOR HOME HEALTH SERVICES AND NEMT SERVICES filed by PETITIONERS [Independent Living Center of Southern California, et al.].

Motion set for hearing on 11/17/2008 at 10:00 AM before Judge Christina A. Snyder. (Attachments: * * *) (Carman, Lynn) (Entered: 10/27/2008)

11/3/2008 226 MEMORANDUM in Opposition to MOTION for Preliminary Injunction re: ENJOIN AB 5 RATE CUT FOR HOME HEALTH SERVICES AND NEMT SERVICES 215 filed by Respondent Sandra Shewry. (Attachments: * * *) (Kim, Jennifer) (Entered: 11/03/2008)

11/4/2008 229 NOTICE Petitioners' Notice of Voluntary Dismissal of the Second Cause of Action (Rule 41(a)(1) F.R.C.P.) filed by Petitioners [Independent Living Center of Southern California, et al.]. (Friedman, Stanley) (Entered: 11/04/2008)

11/10/2008 231 REPLY IN SUPPORT MOTION for Preliminary Injunction re: ENJOIN AB 5 RATE CUT FOR HOME HEALTH SERVICES AND NEMT SERVICES 215 filed by Petitioners [Independent Living Center of Southern California, et al.]. (Carman, Lynn) (Entered: 11/10/2008)

11/10/2008 232 REPLY IN SUPPORT MOTION for Preliminary Injunction re: ENJOIN AB 5 RATE CUT FOR HOME HEALTH SERVICES AND NEMT SERVICES 215 filed by Petitioners [Independent Living Center of

Southern California, et al.]. (Carman, Lynn) (Entered: 11/11/2008)

11/17/2008 238 ORDER GRANTING PETITIONERS' THIRD MOTION FOR PRELIMINARY INJUNCTION by Judge Christina A. Snyder: The Court GRANTS Petitioners' Third Motion for Preliminary Injunction 215. The Court hereby orders respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. &Inst. Code Section 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for NEMT and home health services provided on or after 11/17/2008. (gk) (Entered: 11/18/2008)

12/5/2008 242 MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 48, CCA # 08-56061. The decision of the district court is REVERSED and REMANDED. Mandate received in this district on 12/05/08. (cbr) (Entered: 12/09/2008)

12/16/2008 243 NOTICE OF APPEAL to the 9th CCA filed by Respondent Sandra Shewry. Appeal of Order[,] Preliminary Injunction[,] 238. (Filing Fee NOT PAID.) (Kim, Jennifer) (Entered: 12/16/2008)

2/2/2009	255	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 48, CCA # 08-56061. The Decision of the District Court is REVER[S]ED and REMANDED. Mandate received in this district on 2/02/09. (lr) (Entered: 02/03/2009)
9/15/2009	271	NOTICE OF DISMISSAL filed by PETITIONER Jason Young pursuant to FRCP 41a(1) OF PETITIONER JASON YOUNG ONLY, as to Jason Young, Sandra Shewry. (Carman, Lynn) (Entered: 09/15/2009)
10/29/2009	306	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 243, CCA # 08-57016. The decision of the District Court is AFFIRMED. Mandate received in this district on 10/29/09. (cbr) (Entered: 11/02/2009)
12/3/2009	312	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 180, Notice of Appeal to 9th Circuit Court of Appeals 127, CCA # 08-56422, 08-56554. The Decision of the District Court is AFFIRMED in part, REVERSED in part, and REMANDED. Mandate received in this district on 12/03/09. (lr) (Entered: 12/04/2009)
12/21/2009	317	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals[,] 180, Notice of Appeal to

		9th Circuit Court of Appeals 127, CCA # 08-56422, 08-56554. The Decision of the District Court is AFFIRMED in part, REVERSED in part, and REMANDED. Mandate received in this district on 12/21/09. (lr) (Entered: 12/22/2009)
1/22/2010	323	MINUTES (In Chambers) Order Amending this Court's 8/18/2008 Order Pursuant to the Ninth Circuit Court of Appeals Mandate Issued 12/21/2009 (08-56422 & 08-56554) by Judge Christina A. Snyder: Pursuant to the mandate from the Ninth Circuit, this Court hereby vacates the 8/27/2008 order modifying the injunction 135, and amends the 8/18/2008 order granting in part and denying in part petitioners' motion for preliminary injunction 121 to change the effective date to 7/1/2008. Accordingly, the Court hereby orders respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. & Inst. Code Section 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers for services provided on or

after 7/1/2008. Court Reporter: N/A. (gk) (Entered: 01/25/2010)

1/29/2010 328 **MINUTES (IN CHAMBERS) by Judge Christina A. Snyder: Proceedings: Order Re Respondent's 324 Motion to Alter or Amend and Clarify the 1/22/10 Order, Amending the 8/18/08 Injunction 324. The Court finds this motion appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of February 22, 2010, is hereby vacated, and the matter is hereby taken under submission. The Court hereby modifies the third paragraph, set forth at page 2 of its order, as follows: The Court hereby orders respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. &Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, optometrists, prescription drugs, adult day health care centers, and clinics for services provided on or after July 1, 2008. (mg)** (Entered: 02/01/2010)

3/26/2010	362	COMPLAINT IN INTERVENTION against Respondent David Maxwell-Jolly filed by Intervenors California Association of Medical Product Suppliers, California Hospital Association, Sharp Memorial Hospital, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, and Sharp Coronado Hospital and Healthcare Center.(gk) (Entered: 05/13/2010)
5/24/2010	365	ANSWER to Amended Complaint[,] by Respondent to Petitioners' Verified First Amended Petition for Writ of Mandamus filed by Respondent David Maxwell-Jolly. (Snuggs, Carmen) (Entered: 05/24/2010)
6/2/2010	372	RESPONDENT'S ANSWER TO COMPLAINT IN INTERVENTION ANSWER to Intervenor Complaint, 362 filed by Respondent David Maxwell-Jolly. (Snuggs, Carmen) (Entered: 06/02/2010)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Independent Living Center of Southern California v. Maxwell-Jolly*, No. 08-56422

9/4/2008	5	Filed Appellant Sandra Shewry Civil Appeals Docketing Statement. Served on 09/04/2008. (NEW)
9/23/2008	14	Filed order MOATT: (LL) Appeal No. 08-56422, which seeks review of the district court's August 18, 2008 order, was filed August 26, 2008 and is a preliminary injunction appeal. Appeal No. 08-56551, which seeks review of the district court's August 18, 2008 order, was filed September 15, 2008 and is a preliminary injunction appeal. Appeal No. 08-56554, which seeks review of the district court's August 27, 2008 order, was filed September 15, 2008 and is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply to these appeals. * * * Intervenors-Appellees' request for judicial notice filed in appeal No. 08-56422 is construed as a notice of intervenors-appellees' intervenor status in district court. Because the district court granted intervenors-appellees leave to intervene in the district court action, intervenors-appellees are parties here. See NL Industries, Inc. v. Secretary of Interior, 777 F.2d 433, 436

(9th Cir. 1985). Appellant's "emergency motion for an order denying intervening parties permission to file a brief" and petitioners-appellees' request that intervenors-appellees be designated amicus curiae, both filed in appeal No. 08-56422, are denied as moot. Petitioners-Appellees' request that a prior panel hear appeal No. 08-56422 will be addressed by separate order. * * * These appeals shall be calendared together. [08-56422, 08-56551, 08-56554] (DAF)

9/30/2008 16 Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) Pursuant to the Court's rules, appeal Nos. 08-56422, 08-56551, and 08-56554 will be heard by the panel that decided appeal No. 08-56061. Petitioners-appellants' motion to consolidate appeal Nos. 08-56422, 08- 56551, and 08-56554 with appeal No. 08-50561 is denied. Petitioners-appellants' motion for injunctive relief and for costs will be addressed by separate order. Petitioners-appellants' motion to assign preliminary injunction appeal Nos. 08-56422, 08-56551, and 08-56554 to the panel that decided the merits of appeal No. 08-56061 is denied as moot. The briefing schedule established previously in preliminary injunction appeals Nos. 08-56422, 08-56551, and

		08-56554 shall remain in effect. [08-56061, 08-56422, 08-56551, 08-56554] (SC)
10/3/2008	17	Received copy of a motion filed in district court re: respondent's amended notice of preliminary injunction appeal. (EL)
10/3/2008	18	Filed Civil Appeals Docketing Statement for aplt Sandra Shewry; Served on 10/01/2008. (DR)
10/14/2008	19	Submitted (ECF) Opening brief for review. Submitted by Appellant Sandra Shewry in 08-56422, Appellee Sandra Shewry in 08-56551, 08-56554. Date of service: 10/14/2008. [6674088] [08-56422, 08-56551, 08-56554] (JMK)
10/14/2008	22	Filed Appellant Sandra Shewry excerpts of record in 14 volumes. Served on 10/14/2008 (WP)
10/15/2008	21	Filed Opening Brief [19] filed by Sandra Shewry. * * * (PK)
10/17/2008	24	Filed (ECF) Appellees [Independent Living Center of Southern California, Inc., et al.] Civil Appeals Docketing Statement (Form 6). Date of service: 10/17/2008. [6678378] (LSC)
10/17/2008	25	Filed original and 15 copies of Appellants [Independent Living Center of Southern California, Inc., et al.] in 08-56554 (Informal: No) opening brief of 10 pages. Served on

		10/15/2008. [08-56554, 08-56422, 08-56551] (FT)
11/12/2008	28	Submitted (ECF) Intervenor brief for review. Submitted by Appellees Acacia Adult Day Services, Theodore Mazer, M.D., Ronald B. Mead and Sacramento Family Medical Clinics, Inc. in 08-56422. Date of service: 11/12/2008. [6705085] [08-56422, 08-56551, 08-56554] (CC)
11/13/2008	31	Submitted (ECF) Answering brief for review. Submitted by Appellees [Independent Living Center of Southern California, Inc., et al.]. Date of service: 11/13/2008. [6706061] (SLF)
11/14/2008	32	Filed Answering Brief [31] filed by [Independent Living Center of Southern California, Inc., et al.] in 08-56422. * * * (WP)
11/17/2008	34	Filed Answering Brief [28] filed by Sacramento Family Medical Clinics, Inc., Theodore Mazer, M.D., Ronald B. Mead and Acacia Adult Day Services. * * * [08-56422, 08-56551, 08-56554] (WP)
11/19/2008	37	Filed AARP and National Senior Citizen's Law Center motion for leave of court to file amici brief in support of Appellee, served on 11/18/08 (WP)

11/19/2008	39	Filed California Optometric Association motion for leave to file amicus brief, served on 11/19/2008 (WP)
11/19/2008	40	Received original and 15 copies of Amicus Curiae California Optometric Association brief in 7 pages. Deficiency: Motion pending. Served on. 11/19/2008 (WP)
11/21/2008	38	Received original and 15 copies of Amici Curiae AARP and National Senior Citizen's Law Center brief in 22 pages. Deficiency: motion pending Served on. 11/18/2008 (WP)
11/26/2008	43	Submitted (ECF) Reply brief for review. Submitted by Intervenors Acacia Adult Day Services, Theodore Mazer, M.D., Ronald B. Mead and Sacramento Family Medical Clinics, Inc. in 08-56554. Date of service: 11/26/2008. [6720921] [08-56554, 08-56422] (JBK)
11/26/2008	44	Filed Reply Brief [43] filed by Sacramento Family Medical Clinics, Inc., Theodore Mazer, M.D., Ronald B. Mead and Acacia Adult Day Services in 08-56554. * * * [08-56422, 08-56551, 08-56554] (LA)
12/2/2008	47	Submitted (ECF) Reply brief for review. Submitted by Appellant Sandra Shewry. Date of service: 12/01/2008. [6724098] (CDS)
12/3/2008	48	ENTRY UPDATED. Filed Intervenor-Appellee Acacia Adult Day Services

		additional citations. Served on 12/02/2008. (fedex to panel) (EL)
12/3/2008	49	Filed Reply Brief [47] filed by Sandra Shewry. * * * (WP)
12/22/2008	59	Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) The California Optometric Association's unopposed motion for leave to file an amicus brief is GRANTED. Respondents shall have until January 15, 2009, to file a response to the Association's amicus brief. [08-56422, 08-56551, 08-56554] (BJB)
12/22/2008	60	Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) The motion of AARP, the National Senior Citizens' Law Center, and the National Health Law Program for leave to file an amicus brief is GRANTED. Respondents shall have until January 15, 2009, to file a response to the amicus brief. [08-56422, 08-56551, 08-56554] (BJB)
1/15/2009	64	Filed (ECF) Appellant Sandra Shewry response motion (Amicus Motion, Amicus Motion to become amicus). Date of service: 01/15/2009. [6772775] (CDS)
2/18/2009	70	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH,

JR.. [08-56422, 08-57016, 08-56554] (EU)

4/28/2009 75 (ENTRY UPDATED TO ATTACH CORRECT ORDER) Filed clerk order (Deputy Clerk:BJB): Due to a recent change in circumstances, Judge Berzon has recused herself from this case effective today, and Judge W. Fletcher has been drawn to replace her on the panel. [08-56422, 08-57016, 08-56554] (BJB)

5/7/2009 76 Filed (ECF) Appellees [Independent Living Center of Southern California, Inc., et al.] in 08-56422, Appellants [Independent Living Center of Southern California, Inc., et al.] in 08-56554, 08-57016 citation of supplemental authorities. Date of service: 05/07/2009. [6912789] [08-56422, 08-57016, 08-56554] (SLF)

7/9/2009 81 FILED OPINION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The district court properly applied this court's prior decision in Orthopaedic Hospital to hold that Independent Living has demonstrated a likelihood of success on the merits. Moreover, the district court did not abuse its discretion in determining that the balance of hardships tips sharply in Independent Living's favor, as the ten percent rate reduction threatens access

to much-needed medical care. We therefore affirm the district court's order granting in part Independent Living's motion for a preliminary injunction. However, the district court's subsequent order modifying the injunction to apply only to payments for services provided on or after August 18 was based on an erroneous legal standard. The State of California has waived its sovereign immunity against mandamus actions in state courts seeking reimbursement of unlawfully withheld funds, and the Director, by voluntarily removing this case to federal court, waived the State's sovereign immunity in federal court. We therefore reverse the district court's August 18 order modifying the injunction and remand to the district court for further proceedings consistent with this opinion. AFFIRMED in part, REVERSED in part, and REMANDED. Judge: SR, Judge: WAF, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [6986365] [08-56422, 08-56554] (PH)

7/23/2009 94 Filed (ECF) Appellant Sandra Shewry petition for panel rehearing and petition for rehearing en banc (from 07/09/2009 opinion). Date of service: 07/23/2009. [7002302] (JMK)

8/17/2009	97	Filed order (MILAN D. SMITH, JR.) Petitioners are directed to file a response to Respondent's Petition for Rehearing En Banc, filed with this court on July 23, 2009. The response shall be filed within 21 days of the date of this order. Per Fed. R. App. P. 32(a)(7)(A), the response shall not exceed fifteen pages in length unless it complies with Fed. R. App. P. 32(a)(7)(B)(ii)-(iii) and (C). [7028875] [08-56422, 08-56554] (BJB)
9/8/2009	98	Filed (ECF) Appellees Acacia Adult Day Services, Mark Beckwith, Margaret Dowling, Gray Panthers of Sacramento, Gray Panthers of San Francisco, Independent Living Center of Southern California, Inc., Theodore Mazer, M.D., Ronald B. Mead, Sacramento Family Medical Clinics, Inc., Jerry Shapiro, Sharon Steen and Jason Young response to Order, Order to set response by any party to anything. Date of service: 09/08/2009. [7055104]. – [COURT spread filing to case 08-56554. 09/09/2009 by MA] (CC)
10/29/2009	101	Filed order (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The panel has unanimously voted to deny the petition for rehearing. The full court has been advised of the

		petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [7112659] [08-56422, 08-56554] (BJB)
12/3/2009	106	MANDATE ISSUED. (SR, WAF and MDS) [7150909] [08-56422, 08-56554] (SW)
12/21/2009	112	MANDATE ISSUED. (SR, WAF and MDS) [7170332] [08-56422, 08-56554] (TB)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Independent Living Center of Southern California v. Maxwell-Jolly*, No. 08-56554

9/19/2008	2	Filed Appellants [Independent Living Center of Southern California, Inc., et al.] Civil Appeals Docketing Statement. Served on 09/15/2008. (GR)
9/23/2008	7	Filed order MOATT: (LL) Appeal No. 08-56422, which seeks review of the district court's August 18, 2008 order, was filed August 26, 2008 and is a preliminary injunction appeal. Appeal No. 08-56551, which seeks review of the district court's August 18, 2008 order, was filed September 15, 2008 and is a preliminary injunction appeal. Appeal No. 08-56554, which seeks review of the district court's August 27, 2008 order, was filed September 15, 2008 and is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply to these appeals. * * * Intervenors-Appellees' request for judicial notice filed in appeal No. 08-56422 is construed as a notice of intervenors-appellees' intervenor status in district court. Because the district court granted intervenors-appellees leave to intervene in the district court action, intervenors – appellees are parties

here. See NL Industries, Inc. v. Secretary of Interior, 777 F.2d 433, 436 (9th Cir. 1985). Appellant's "emergency motion for an order denying intervening parties permission to file a brief" and petitioners-appellees' request that intervenors-appellees be designated amicus curiae, both filed in appeal No. 08-56422, are denied as moot. Petitioners-Appellees' request that a prior panel hear appeal No. 08-56422 will be addressed by separate order. * * * These appeals shall be calendared together. [08-56422, 08-56551, 08-56554] (DAF)

9/30/2008 8 Filed order (STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) Pursuant to the Court's rules, appeal Nos. 08-56422, 08-56551, and 08-56554 will be heard by the panel that decided appeal No. 08-56061. Petitioners-appellants' motion to consolidate appeal Nos. 08-56422, 08- 56551, and 08-56554 with appeal No. 08-50561 is denied. Petitioners-appellants' motion for injunctive relief and for costs will be addressed by separate order. Petitioners-appellants' motion to assign preliminary injunction appeal Nos. 08-56422, 08-56551, and 08-56554 to the panel that decided the merits of appeal No. 08-56061 is denied as moot. The briefing

schedule established previously in preliminary injunction appeals Nos. 08-56422, 08-56551, and 08-56554 shall remain in effect. [08-56061, 08-56422, 08-56551, 08-56554] (SC)

10/15/2008 12 Received original and 15 copies of Appellants [Independent Living Center of Southern California, Inc., et al.] opening brief (Informal: No) 10 pages. Served on 10/15/2008. Deficiency: Motion pending. : (FT)

10/15/2008 13 Received Appellants [Independent Living Center of Southern California, Inc., et al.], Appellee Sandra Shewry and Intervenors Acacia Adult Day Services, Theodore Mazer, M.D., Ronald B. Mead and Sacramento Family Medical Clinics, Inc. Notice regarding Adoption of Excerpts of Record already filed in companion appeals 08-56061 and 08-56422. (FT)

10/17/2008 15 Filed original and 15 copies of Appellants [Independent Living Center of Southern California, Inc., et al.] in 08-56554 (Informal: No) opening brief of 10 pages. Served on 10/15/2008. [08-56554, 08-56422, 08-56551] (FT)

10/30/2008 24 Received copy of amended notice of appeal from district court. (BY)

11/12/2008 18 Submitted (ECF) Answering brief for review. Submitted by Appellee

Sandra Shewry. Date of service: 11/12/2008. [6704959] (CDS)

11/12/2008 19 Submitted (ECF) Intervenor brief for review. Submitted by Appellees Acacia Adult Day Services, Theodore Mazer, M.D., Ronald B. Mead and Sacramento Family Medical Clinics, Inc. in 08-56422. Date of service: 11/12/2008. [6705085] [08-56422, 08-56551, 08-56554] (CC)

11/14/2008 21 Filed Answering Brief [18] filed by Sandra Shewry in 08-56554. * * * (FT)

11/17/2008 23 Filed Answering Brief [19] filed by Sacramento Family Medical Clinics, Inc., Theodore Mazer, M.D., Ronald B. Mead and Acacia Adult Day Services. * * * [08-56422, 08-56551, 08-56554] (WP)

11/26/2008 28 Submitted (ECF) Reply brief for review. Submitted by Appellants [Independent Living Center of Southern California, Inc., et al.]. Date of service: 11/26/2008. [6720620] (SLF)

11/26/2008 29 Submitted (ECF) Reply brief for review. Submitted by Intervenors Acacia Adult Day Services, Theodore Mazer, M.D., Ronald B. Mead and Sacramento Family Medical Clinics, Inc. in 08-56554. Date of service: 11/26/2008. [6720921] [08-56554, 08-56422] (JBK)

11/26/2008	30	Filed Reply Brief [29] filed by Sacramento Family Medical Clinics, Inc., Theodore Mazer, M.D., Ronald B. Mead and Acacia Adult Day Services in 08-56554. * * * [08-56422, 08-56551, 08-56554] (LA)
11/26/2008	31	Filed Reply Brief [28] filed by [Independent Living Center of Southern California, Inc., et al.] in 08-56554. * * * (FT)
2/18/2009	47	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.. [08-56422, 08-57016, 08-56554] (EU)
4/28/2009	51	(ENTRY UPDATED TO ATTACH CORRECT ORDER) Filed clerk order (Deputy Clerk: BJB): Due to a recent change in circumstances, Judge Berzon has recused herself from this case effective today, and Judge W. Fletcher has been drawn to replace her on the panel. [08-56422, 08-57016, 08-56554] (BJB)
5/7/2009	52	Filed (ECF) Appellees [Independent Living Center of Southern California, Inc., et al.] in 08-56422, Appellants [Independent Living Center of Southern California, Inc., et al.] in 08-56554, 08-57016 citation of supplemental authorities. Date of service: 05/07/2009. [6912789] [08-56422, 08-57016, 08-56554] (SLF)

7/9/2009	57	FILED OPINION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The district court properly applied this court's prior decision in Orthopaedic Hospital to hold that Independent Living has demonstrated a likelihood of success on the merits. Moreover, the district court did not abuse its discretion in determining that the balance of hardships tips sharply in Independent Living's favor, as the ten percent rate reduction threatens access to much-needed medical care. We therefore affirm the district court's order granting in part Independent Living's motion for a preliminary injunction. However, the district court's subsequent order modifying the injunction to apply only to payments for services provided on or after August 18 was based on an erroneous legal standard. The State of California has waived its sovereign immunity against mandamus actions in state courts seeking reimbursement of unlawfully withheld funds, and the Director, by voluntarily removing this case to federal court, waived the State's sovereign immunity in federal court. We therefore reverse the district court's August 18 order modifying the injunction and remand to

		the district court for further proceedings consistent with this opinion. AFFIRMED in part, REVERSED in part, and REMANDED. Judge: SR, Judge: WAF, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [6986365] [08-56422, 08-56554] (PH)
8/17/2009	63	Filed order (MILAN D. SMITH, JR.) Petitioners are directed to file a response to Respondent's Petition for Rehearing En Banc, filed with this court on July 23, 2009. The response shall be filed within 21 days of the date of this order. Per Fed. R. App. P. 32(a)(7)(A), the response shall not exceed fifteen pages in length unless it complies with Fed. R. App. P. 32(a)(7)(B)(ii)-(iii) and (C). [7028875] [08-56422, 08-56554] (BJB)
9/8/2009	64	Filed (ECF) Appellees Acacia Adult Day Services, Mark Beckwith, Margaret Dowling, Gray Panthers of Sacramento, Gray Panthers of San Francisco, Independent Living Center of Southern California, Inc., Theodore Mazer, M.D., Ronald B. Mead, Sacramento Family Medical Clinics, Inc., Jerry Shapiro, Sharon Steen and Jason Young response to Order, Order to set response by any party to anything. Date of service: 09/08/2009. [7055104]. – [COURT

		spread filing to case 08-56554. 09/09/2009 by MA] (CC)
10/29/2009	67	Filed order (STEPHEN R REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The panel has unanimously voted to deny the petition for rehearing. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [7112659] [08-56422, 08-56554] (BJB)
12/3/2009	72	MANDATE ISSUED. (SR, WAF and MDS) [7150909] [08-56422, 08-56554] (SW)
12/21/2009	78	MANDATE ISSUED. (SR, WAF and MDS) [7170332] [08-56422, 08-56554] (TB)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Independent Living Center of Southern California v. Maxwell-Jolly*, No. 08-57016

12/17/2008	3	Filed Appellants Department of Health Care Services and Sandra Shewry Civil Appeals Docketing Statement. Served on 12/16/2008. (GR)
1/16/2009	9	Submitted (ECF) Opening brief for review. Submitted by Appellant Sandra Shewry. Date of service: 01/16/2009. [6773973] (CDS)
1/16/2009		Filed Opening Brief [9] filed by Sandra Shewry. * * * (WP)
1/20/2009	11	Filed Appellant Sandra Shewry excerpts of record in 2 volumes. Served on 01/16/2009 (PANEL) (WP)
1/29/2009	13	Submitted (ECF) Answering brief for review. Submitted by Appellees [Independent Living Center of Southern California, Inc., et al.]. Date of service: 01/29/2009. [6790444] (SLF)
1/30/2009		Filed Answering Brief [13] filed by [Independent Living Center of Southern California, Inc., et al.] in 08-57016. * * * (WP)
2/2/2009	14	Submitted (ECF) Reply brief for review. Submitted by Appellant Sandra

		Shewry. Date of service: 02/02/2009. [6793867] (CDS)
2/3/2009		Filed Reply Brief [14] filed by Sandra Shewry. * * * (PANEL) (WP)
2/18/2009	21	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.. [08-56422, 08-57016, 08-56554] (EU)
4/28/2009	25	(ENTRY UPDATED TO ATTACH CORRECT ORDER) Filed clerk order (Deputy Clerk: BJB): Due to a recent change in circumstances, Judge Berzon has recused herself from this case effective today, and Judge W. Fletcher has been drawn to replace her on the panel. [08-56422, 08-57016, 08-56554] (BJB)
5/7/2009	26	Filed (ECF) Appellees [Independent Living Center of Southern California, Inc., et al.] in 08-56422, Appellants [Independent Living Center of Southern California, Inc., et al.] in 08-56554, 08-57016 citation of supplemental authorities. Date of service: 05/07/2009. [6912789] [08-56422, 08-57016, 08-56554] (SLF)
8/7/2009	30	FILED MEMORANDUM DISPOSITION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) AFFIRMED. FILED AND ENTERED JUDGMENT. [7019649] (DD)

8/21/2009	36	Filed (ECF) Appellants Department of Health Care Services and Sandra Shewry petition for rehearing en banc (from 08/07/2009 memorandum). Date of service: 08/21/2009. [7037139] (GDB)
9/23/2009	37	Filed order (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.): The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. The petition for rehearing en banc is DENIED. [7071317] (AF)
10/29/2009	38	MANDATE ISSUED. (SR, WAF and MDS) [7111877] (RR)

Relevant Docket Entries in the United States District Court for the Central District of California, *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, No. CV 09-382 CAS (MANx)

Date	No.	Docket Text
1/16/2009	1	COMPLAINT against Defendant David Maxwell-Jolly. (Filing fee $350: FEE PAID.), filed by plaintiffs Sharon Steen, Tran Pharmacy, Inc., Managed Pharmacy Care, Independent Living Center of Southern California, Inc., Gerald Shapiro. (ghap) (Additional attachment(s) added on 1/21/2009: # 1 Notice of Assignment, # 2 Civil Cover Sheet) (ds). (Additional attachment(s) added on 1/21/2009: # 3 Summons) (ds). (Entered: 01/20/2009)
2/2/2009	10	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: [TO] ENJOIN 5% PHARMACY RATE CUT AND PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION filed by PLAINTIFFS Sharon Steen, Tran Pharmacy, Inc., Independent Living Center of Southern California, Inc., Gerald Shapiro. Motion set for hearing on 2/23/2009 at 10:00 AM before Judge Christina A. Snyder. (Carman, Lynn) (Entered: 02/02/2009)

2/11/2009	24	OPPOSITION DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION re: MOTION for Preliminary Injunction re: [TO] ENJOIN 5% PHARMACY RATE CUT AND PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION 10 filed by Defendant David Maxwell-Jolly. (Attachments: * * *) (Kim, Jennifer) (Entered: 02/11/2009)
2/13/2009	25	NOTICE NOTICE [sic] OF ERRATA RE: DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION filed by Defendant David Maxwell-Jolly. (Kim, Jennifer) (Entered: 02/13/2009)
2/16/2009	26	REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION MOTION for Preliminary Injunction re: [TO] ENJOIN 5% PHARMACY RATE CUT AND PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION 10 filed by Plaintiffs Sharon Steen, Tran Pharmacy, Inc., Independent Living Center of Southern California, Inc., Gerald Shapiro. (Attachments: * * *) (Carman, Lynn) (Entered: 02/16/2009)
2/19/2009	28	ANSWER TO COMPLAINT filed by Defendant David Maxwell-Jolly. (Kim, Jennifer) (Entered: 02/19/2009)

2/23/2009	30	NOTICE OF LODGING filed AND LODGING OF ORDER IN SANTA ROSA MEMORIAL HOSPITAL, ET AL v DAVID MAXWELL-JOLLY re Objection/Opposition (Motion related) * * * 24 (Kim, Jennifer) (Entered: 02/23/2009)
2/23/2009	36	MINUTES OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (filed 02/02/09) held before Judge Christina A. Snyder: Hearing held and counsel are present. Tentative order provided. The Court confers with counsel and counsel argue. The Court takes plaintiffs' motion under submission. The Court will issue a final ruling. Court Reporter: Laura Elias. (bm) (Entered: 03/02/2009)
2/27/2009	34	ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION by Judge Christina A. Snyder: The Court GRANTS Plaintiffs' Motion for Preliminary Injunction 10. The Court hereby orders respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code Section 14105.191(b)(3), as modified by AB 1183 beginning on March 1, 2009, by refraining from reducing by five percent payments to pharmacies

for prescription drugs (including prescription drugs and traditional over-the counter drugs provided by prescription) provided under the Medi-Cal fee-for-service program. (gk) (Entered: 02/27/2009)

3/13/2009 38 NOTICE OF MOTION AND MOTION for Preliminary Injunction re: DEFENDANTS MOTION TO ALTER OR AMEND, AND CLARIFY ORDER GRANTING PLAINTIFFS; MOTION FOR PRELIMINARY INJUNCTION filed by Defendant David Maxwell-Jolly. Motion set for hearing on 4/6/2009 at 10:00 AM before Judge Christina A. Snyder. (Attachments: * * *) (Cardenas, Jesse) (Entered: 03/13/2009)

3/13/2009 40 NOTICE OF MOTION re MOTION for Preliminary Injunction re: DEFENDANTS MOTION TO ALTER OR AMEND, AND CLARIFY ORDER GRANTING PLAINTIFFS; MOTION FOR PRELIMINARY INJUNCTION 38 filed by Defendant David Maxwell-Jolly. Motion set for hearing on 4/6/2009 at 10:00 AM before Judge Christina A. Snyder. (Cardenas, Jesse) (Entered: 03/13/2009)

3/23/2009 42 OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND, AND CLARIFY FEB. 27, 2009 ORDER filed by Plaintiffs Sharon

Steen, Tran Pharmacy, Inc., Independent Living Center of Southern California, Inc., Gerald Shapiro. (Attachments: * * *) (Carman, Lynn) (Entered: 03/23/2009)

3/30/2009 43 REPLY BRIEF TO PLAINTIFF'S OPPOSITION to MOTION for Preliminary Injunction re: DEFENDANTS MOTION TO ALTER OR AMEND, AND CLARIFY ORDER GRANTING PLAINTIFFS; MOTION FOR PRELIMINARY INJUNCTION 38 filed by Defendant David Maxwell-Jolly. (Cardenas, Jesse) (Entered: 03/30/2009)

4/3/2009 44 MINUTES (IN CHAMBERS) by Judge Christina A. Snyder: The Court DENIES Defendant's Motion to Alter, Amend, or Clarify the Court's 2/27/2009 Order 38. Court Reporter: Not Present. (gk) (Entered: 04/03/2009)

4/30/2009 46 NOTICE OF PRELIMINARY INJUNCTION APPEAL filed by Defendant David Maxwell-Jolly. (Attachments: # 1 US Court of Appeals for the 9th Circuit Civi[l] A[p]peals Docketing Statement) (Kim, Jennifer) (Entered: 04/30/2009)

5/6/2009 47 NOTICE OF APPEAL to the 9th CCA filed by Defendant David Maxwell-Jolly. (Filing Fee PAID.) (Attachments: # 1 NOTICE OF

		ERROR IN AND CORRECTION TO DOCKET, # 2 NOTICE OF PRELIMINARY INJUNCTION APPEAL, # 3 US COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT) (Kim, Jennifer) (Entered: 05/06/2009)
3/25/2010	74	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 47, CCA # 09-55692. The Decision of the District Court is AFFIRMED. Mandate received in this district on 3/25/2010. (lr) (Entered: 03/26/2010)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, No. 09-55692

Date	No.	Docket Text
5/7/2009	3	Filed Appellant David Maxwell-Jolly Civil Appeals Docketing Statement. Served on 04/30/2009. (JN)
6/17/2009	15	Filed Appellant David Maxwell-Jolly four excerpts of record in 4 volumes. Served on 06/16/2009. [6970843] (GLS)
6/19/2009	12	Submitted (ECF) Opening brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 06/16/2009. [6963358] (EB)
6/22/2009	13	Filed clerk order: Opening Brief [12] filed by David Maxwell-Jolly. * * * [6963934] (GLS)
7/29/2009	18	Submitted (ECF) Answering brief for review * * *. Submitted by Appellees Independent Living Center of Southern California, Inc., Gerald Shapiro, Sharon Steen and Tran Pharmacy, Inc.. Date of service: 07/29/2009. [7008929] – [COURT attached certificate of service from deleted entry [7007388]. 08/18/2009 by MA] (LSC)
7/29/2009	19	Received Appellees Independent Living Center of Southern California, Inc., Gerald Shapiro, Sharon Steen and Tran Pharmacy, Inc. four

		supplemental excerpt of record on appeal in 1 volume entitled "Volume 5." Deficiency: motion pending. (SHELF). [7013504] (GLS)
8/4/2009	23	Filed clerk order: Answering Brief [18] filed by Independent Living Center of Southern California, Inc., Gerald Shapiro, Sharon Steen and Tran Pharmacy, Inc. * * * [7017106] (GLS)
8/4/2009	24	Filed Appellees Independent Living Center of Southern California, Inc., Gerald Shapiro, Sharon Steen and Tran Pharmacy, Inc. four supplemental excerpts of record on appeal in 1 volume entitled "Volume 5." [7017215] (GLS)
8/18/2009	27	Submitted (ECF) Reply brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 08/18/2009. [7032074] (EB)
8/29/2009	28	Filed clerk order: Reply Brief [27] filed by David Maxwell-Jolly. * * * [7032468] (GLS)
1/19/2010	54	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.. [7198958] (LN)
1/26/2010	55	Filed (ECF) Appellant David Maxwell-Jolly citation of supplemental authorities. Date of service: 01/26/2010. [7207601] (DP)

2/2/2010	56	Filed (ECF) Appellees Independent Living Center of Southern California, Inc., Jerry Shapiro, Sharon Steen and Tran Pharmacy, Inc. Correspondence: INFORMATION REQUESTED BY THE COURT AT ORAL ARGUMENT. Date of service: 02/02/2010 [7217528] (LSC)
2/2/2010	57	Filed (ECF) Appellees Independent Living Center of Southern California, Inc., Jerry Shapiro, Sharon Steen and Tran Pharmacy, Inc. Correspondence: CORRECTION OF CLERICAL ERROR TO SUBSTITUTE THE CORRECT "EXHIBIT B" TO LETTER FILED BY APPEL[L]EES EARLIER THIS DATE OF FEBRUARY 2, 2010. Date of service: 02/02/2010 [7217649] (LSC)
2/8/2010	58	Filed (ECF) Appellant David Maxwell-Jolly citation of supplemental authorities. Date of service: 02/08/2010. [7223037] (DP)
3/3/2010	59	FILED MEMORANDUM DISPOSITION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) AFFIRMED. FILED AND ENTERED JUDGMENT. [7250755] (PH)
3/25/2010	60	MANDATE ISSUED. (SR, WAF and MDS) [7278995] (LC)

Relevant Docket Entries in the United States District Court for the Central District of California, *California Pharmacists Association v. Maxwell-Jolly*, No. CV 09-722 CAS (MANx)

Date	No.	Docket Text
1/29/2009	1	COMPLAINT against Defendant David Maxwell-Jolly. (Filing fee $350 PAID.), filed by Plaintiffs [California Pharmacists Association, et al.]. (et) (ds). (Entered: 02/02/2009)
2/11/2009	13	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: Implementation of rate reduction for pharmacies and adult day health care centers filed by Plaintiffs [California Pharmacists Association, et al.]. Motion set for hearing on 3/9/2009 at 10:00 AM before Judge Christina A. Snyder. (Attachments: * * *) (Sze, Felicia) (Entered: 02/11/2009)
2/13/2009	16	NOTICE OF MOTION AND MOTION for Preliminary Injunction re: AB 1183 Rate Reductions for Hospital Services filed by Plaintiffs [California Pharmacists Association, et al.]. Motion set for hearing on 3/9/2009 at 10:00 AM before Judge Christina A. Snyder. (Attachments: * * *) (Bookman, Lloyd) (Entered: 02/13/2009)
2/26/2009	22	MEMORANDUM in Opposition to MOTION for Preliminary Injunction

re: Implementation of rate reduction for pharmacies and adult day health care centers 13 filed by Defendant David Maxwell-Jolly. (Attachments: * * *) (Kim, Jennifer) (Entered: 02/27/2009)

2/27/2009 23 MEMORANDUM in Opposition to MOTION for Preliminary Injunction re: AB 1183 Rate Reductions for Hospital Services 16 filed by Defendant David Maxwell-Jolly. (Attachments: * * *) (Kim, Jennifer) (Entered: 02/27/2009)

3/4/2009 25 REPLY in support MOTION for Preliminary Injunction re: AB 1183 Rate Reductions for Hospital Services 16 filed by Plaintiffs [California Pharmacists Association, et al.]. (Attachments: * * *) (Keville, Jordan) (Entered: 03/04/2009)

3/4/2009 26 REPLY to Opposition to Motion for Preliminary Injunction filed by Plaintiffs [California Pharmacists Association, et al.]. (Cannizzo, Craig) (Entered: 03/04/2009)

3/4/2009 29 LODGMENT OF STATE AUTHORITIES re MOTION for Preliminary Injunction re: Implementation of rate reduction for pharmacies and adult day health care centers 13 (REPLY TO OPPOSITION) filed by Plaintiffs [California Pharmacists Association,

et al.]. (Cannizzo, Craig) (Entered: 03/04/2009)

3/5/2009	30	ANSWER to Complaint – (Discovery), Complaint – (Discovery), Complaint – (Discovery) 1 filed by Defendant David Maxwell-Jolly. (Murphy, Randall) (Entered: 03/05/2009)
3/5/2009	31	SUPPLEMENT to MOTION for Preliminary Injunction re: AB 1183 Rate Reductions for Hospital Services 16 Lodgment of State Authority in Support of Reply filed by Plaintiffs [California Pharmacists Association, et al.]. (Attachments: * * *) (Keville, Jordan) (Entered: 03/05/2009)
3/9/2009	35	ORDER by Judge Christina A. Snyder GRANTING Plaintiffs' MOTION for Preliminary Injunction as to Adult Day Health Centers 13. The Court GRANTS plaintiffs' motion for preliminary injunction. The Court hereby orders respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191, as modified by AB 1183 beginning on March 9, 2009, by refraining from reducing by five percent payments to ADHCs provided under the Medi-Cal fee-for-service program. (mg) (Entered: 03/10/2009)

3/9/2009	36	ORDER by Judge Christina A. Snyder DENYING Plaintiffs' MOTION for Preliminary Injunction as to Hospitals 16. The Court DENIES plaintiffs' motion for preliminary injunction with regard to AB 1183's reimbursement rate reduction to hospitals, without prejudice to its being renewed after the Ninth Circuit rules on the appeal in Independent Living Center of Southern California, Inc. v. Sandra Shewry, CV-08-3315-CAS. (mg) TT (Entered: 03/10/2009)
3/11/2009	40	NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs [California Pharmacists Association, et al.]. Appeal of Order, 36. (Filing fee $455, receipt number 09730000000005018086.) (Attachments: * * *) (Keville, Jordan) (Entered: 03/11/2009)
3/11/2009	41	FIRST AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by Plaintiffs California Hospital Association, Sharp Memorial Hospital, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center. Amending Notice of Appeal to 9th Circuit Court of Appeals, 40 Filed On: 3/11/09; Entered On: 3/11/09; (Attachments:

		* * *) (Keville, Jordan) (Entered: 03/11/2009)
4/6/2009	55	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals[,] 40 filed by [California Pharmacists Association, et al.], CCA # 09-55365. The Plaintiffs MOTION FOR STAY PENDING APPEAL IS GRANTED. Order received in this district on 4/06/09. (lr) (Entered: 04/10/2009)
4/7/2009	50	NOTICE OF APPEAL to the 9th CCA filed by Defendant David Maxwell-Jolly. Appeal of Order[,] 35. (Kim, Jennifer) (Entered: 04/07/2009)
5/28/2009	65	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals[,] 40 filed by [California Pharmacists Association, et al.], CCA # 09-55365. We consider the Urgent Motion for Clarification Pursuant to Circuit Rules 27-3(b) and 27-10 filed by Plaintiffs-Appellants California Pharmacists Association, et al. (the Hospital Plaintiffs). The Hospital Plaintiffs filed the instant motion more than fourteen days after the date of our April 6, 2009 Order, in violation of Circuit Rule 27-10(a). Nevertheless, we find that the Hospital Plaintiffs were not, and could not have been, aware of the matter in which the

Director would implement our Order until after the fourteen-day period had passed. Under the circumstances, and pursuant to Circuit Rule 27-10(a), we enlarge the said fourteen-day period, and consider the motion. We resolve the Hospital Plaintiffs' motion and clarify our April 6, 2009 Order as follows: Those sections, or portions of sections, of the California Welfare and Institutions Code added or amended by Assembly Bill 5 that were not purportedly amended or deleted by the text of California Assembly Bill 1183 are not covered by, nor is the implementation thereof stayed by, our April 6, 2009 Order. Order received in this district on 5/28/09. (lr) (Entered: 06/01/2009)

3/25/2010 77 MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 50, CCA # 09-55532. The decision of the district court is affirmed. Mandate received in this district on 3/25/2010. (dmap) (Entered: 03/26/2010)

3/25/2010 78 MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 40, CCA # 09-55365. The decision of the district court is affirmed. Mandate received in this district on 3/25/2010. (dmap) (Entered: 03/26/2010)

4/16/2010 81 MINUTES (IN CHAMBERS): Order Vacating this Court's 3/9/2009 Order and Granting Plaintiffs' Motion for Preliminary Injunction Pursuant to the Ninth Circuit Court of Appeals Mandate Issued 3/25/2010 (09-55365) by Judge Christina A. Snyder: Pursuant to the mandate from the Ninth Circuit, this Court hereby vacates the 3/9/2009 order denying plaintiffs' motion for preliminary injunction with regard to AB 1183's reimbursement rate reduction to hospitals 36. Accordingly, the Court hereby grants plaintiffs' Motion for Preliminary Injunction 46 and orders respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code Section 14105.191 and 14166.245, as modified by AB 1183, beginning on April 16, 2010, by refraining from reducing by five percent payments to hospitals for services provided under the Medi-Cal fee-for-service program, which include non-contract inpatient hospital services, outpatient services, Distinct Part Nursing Facilities, and subacute services. Court Reporter: Not Present. (gk) (Entered: 04/16/2010)

6/16/2010 86 ORDER by Judge Christina A. Snyder GRANTING Joint Motion for

Modification of Court's April 16, 2010 Preliminary Injunction Order 84. The Court's April 16 order will be amended to read as follows Pursuant to the mandate from the Ninth Circuit, this Court hereby vacates the March 9, 2009 order denying plaintiffs' motion for a preliminary injunction with regard to AB 1183's reimbursement rate reduction to hospitals. According, the Court hereby grants plaintiffs' motion for preliminary injunction and orders respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code 14105.191 and 14166.245 with respect to services provided under the fee-for-service Medi-Cal program, by refraining. (See attached Order for further information). (jp) (Entered: 06/17/2010)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *California Pharmacists Association v. Maxwell-Jolly*, No. 09-55365

Date	No.	Docket Text
3/12/2009	2	Filed Appellants' Civil Appeals Docketing Statement. Served on 03/11/2009. (FB)
3/12/2009	6	Filed (ECF) Appellants California Hospital Association, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center and Sharp Memorial Hospital EMERGENCY Motion for injunction pending appeal. Date of service: 03/12/2009. [6843589] (JBK)
3/19/2009	10	Filed (ECF) Appellee David Maxwell-Jolly response opposing motion (Civil Appeals Docketing Stmnt Forms). Date of service: 03/18/2009. [6852022] (JMK)
3/20/2009	11	Filed (ECF) Appellants California Hospital Association, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center and Sharp Memorial Hospital reply to response (Response to Motion (ECF Filing)). Date of service: 03/20/2009. [6853670] (JBK)

4/6/2009	21	Filed Order for PUBLICATION In light of the showing made by the Hospital Plaintiffs in this case, we grant their motion for an order staying the rate cuts in AB 1183 with respect to the specified hospital services pending their appeal to this court of the district court's order denying the motion for preliminary injunction. MOTION FOR STAY PENDING APPEAL IS GRANTED.(STEPHEN R. REINHARDT, MARSHA S. BERZON and MILAN D. SMITH, JR.) (PH)
4/9/2009	26	Submitted (ECF) Opening brief for review. Submitted by Appellants California Hospital Association, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center and Sharp Memorial Hospital. Date of service: 04/09/2009. [6878244] (JBK)
4/9/2009		Filed clerk order: Opening Brief [26] filed by California Hospital Association, Sharp Memorial Hospital, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center and Sharp Coronado Hospital and Healthcare Center in 09-55365. * * * (LA)
4/9/2009	27	Filed Appellants' excerpts of record in 9 volumes. Served on 04/08/2009 (LA)

4/20/2009	29	Filed (ECF) Appellee David Maxwell-Jolly motion for reconsideration of nondispositive Judge Order of 04/06/2009. Date of service: 04/20/2009. [6889606] (JMK)
5/7/2009	32	Submitted (ECF) Answering brief for review. Submitted by Appellee David Maxwell-Jolly. Date of service: 05/06/2009. [6913545] (JMK)
5/7/2009		Filed clerk order: Answering Brief [32] filed by David Maxwell-Jolly. * * * (LA)
5/7/2009	33	Filed Appellee David Maxwell-Jolly supplemental excerpts of record on appeal in 1 volume. (LA)
5/13/2009	34	Filed (ECF) Appellant California Hospital Association in 09-55365 Urgent Motion for miscellaneous relief [Urgent Motion for Clarification Pursuant to Circuit Rules 27-3(B) and 27-10]. Date of service: 05/13/2009. [6919269] [09-55365, 09-55532] (JBK)
5/21/2009	37	Filed (ECF) Appellant California Hospital Association in 09-55365 reply to response (Motion (ECF Filing), Motion (ECF Filing) motion for miscellaneous relief (to be used only if no other relief applies), Response to Motion (ECF Filing)). Date of service: 05/21/2009. [6929294] [09-55365, 09-55532] (JBK)

5/26/2009	39	Filed order (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) Plaintiffs-Appellants are directed to file a response to Defendant-Appellee's Petition for Rehearing En Banc, filed with this court on April 20, 2009. The response shall not exceed 15 pages, shall be filed within 21 days of the date of this order, and Plaintiff-Appellant shall provide this court with 50 copies of any such response. (SC)
5/28/2009	44	Filed order (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The Hospital Plaintiffs filed the instant motion more than fourteen days after the date of our April 6, 2009 Order, in violation of Circuit Rule 27-10(a). Nevertheless, we find that the Hospital Plaintiffs were not, and could not have been, aware of the manner in which the Director would implement our Order until after the fourteen-day period had passed. Under the circumstances, and pursuant to Circuit Rule 27-10(a), we enlarge the said fourteen-day period, and consider the motion. We resolve the Hospital Plaintiffs' motion and clarify our April 6, 2009 Order as follows: Those sections, or portions of sections, of the California Welfare and Institutions Code added

		or amended by Assembly Bill 5 that were not purportedly amended or deleted by the text of California Assembly Bill 1183 are not covered by, nor is the implementation thereof stayed by, our April 6, 2009 Order. (SC)
6/1/2009	45	Submitted (ECF) Reply brief for review. Submitted by Appellants California Hospital Association, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center and Sharp Memorial Hospital. Date of service: 06/01/2009. [6939979] (JBK)
6/15/2009		Filed clerk order: Reply Brief [45] filed by California Hospital Association, Sharp Memorial Hospital, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center and Sharp Coronado Hospital and Healthcare Center. * * * (LA)
6/16/2009	49	Filed (ECF) Appellants California Hospital Association, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, Sharp Coronado Hospital and Healthcare Center and Sharp Memorial Hospital response to petition for rehearing en banc. Date of service: 06/16/2009. [6958844]. [Court corrected docket text to reflect filing – 6/26/09 by SS] (JBK)

8/24/2009	51	Filed order (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) The panel has unanimously voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [7037978] (SC)
1/19/2010	63	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.. [7199044] [09-55365, 09-55532] (LN)
3/3/2010	64	FILED MEMORANDUM DISPOSITION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) REVERSED AND REMANDED. FILED AND ENTERED JUDGMENT. [7250739] (PH)
3/25/2010	65	MANDATE ISSUED. (SR, WAF and MDS) [7278452] (GV)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *California Pharmacists Association v. Maxwell-Jolly*, No. 09-55532

Date	No.	Docket Text
4/8/2009	3	Filed Appellant David Maxwell-Jolly Civil Appeals Docketing Statement. Served on 04/07/2009. (BG)
5/19/2009	11	Submitted (ECF) Opening brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 05/19/2009. [6926567] (GMC)
5/20/2009	13	Filed Appellant David Maxwell-Jolly excerpts of record in 5 volumes. Served on 05/19/2009 (PK)
5/26/2009	15	Filed clerk order: Opening Brief [11] filed by David Maxwell-Jolly. * * * (LA)
6/30/2009	20	Submitted (ECF) Answering brief for review. Submitted by Appellees Acacia Adult Day Services, California Association For Adult Day Services, Charles Gallagher and Fey Garcia. Date of service: 06/30/2009. [6975733] (JBK)
7/2/2009	21	Filed clerk order: Answering Brief [20] filed by Acacia Adult Day Services, California Association For Adult Day Services, Fey Garcia and Charles Gallagher. * * * [6979134] (PK)

7/28/2009	23	Submitted (ECF) Reply brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 07/28/2009. [7007163] (GMC)
7/30/2009	24	Filed clerk order: Reply Brief [23] filed by David Maxwell-Jolly. * * * [7010403] (PK)
1/19/2010	36	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.. [7199044] [09-55365, 09-55532] (LN)
3/3/2010	37	FILED OPINION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) AFFIRMED. Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [7250575] (RP)
3/25/2010	38	MANDATE ISSUED. (SR, WAF and MDS) [7278098] (SW)

Relevant Docket Entries in the United States District Court for the Northern District of California, *Dominguez v. Schwarzenegger*, No. CV 09-2306 CW

Date	No.	Docket Text
5/26/2009	1	COMPLAINT against Arnold Schwarzenegger, John A. Wagner, David Maxwell-Jolly, John Chiang, Fresno County, Fresno County In-Home Supportive Services Public Authority (Filing fee $350, receipt number 34611032471.). Filed by [Lydia Dominguez, et al.]. (Attachments: * * *) (cp, COURT STAFF) (Filed on 5/26/2009) (Entered 5/27/2009)
06/04/2009	5	MOTION for Preliminary Injunction; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT filed by [Lydia Dominguez, et al.] (Leyton, Stacey) (Filed on 6/4/2009) Modified on 6/5/2009 (cp, COURT STAFF). (Entered: 06/04/2009)
6/15/2009	95	Memorandum in Opposition to 5 MOTION for Preliminary Injunction filed by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner. (Carson, Susan) (Filed on 6/15/2009) Modified on 6/16/2009 (kc, COURT STAFF). (Entered: 06/15/2009)
6/19/2009	110	Reply Memorandum re 5 MOTION for Preliminary Injunction filed by [Lydia Dominguez, et al.]. (Leyton,

Stacey) (Filed on 6/19/2009) (Entered: 06/19/2009)

6/22/2009 126 STATEMENT OF RECENT DECISION pursuant to Civil Local Rule 7-3.d filed by [Lydia Dominguez, et al.]. (Attachments: * * *) (Related document(s) 5) (Leyton, Stacey) (Filed on 6/22/2009) (Entered: 06/22/2009)

6/26/2009 130 PRELIMINARY INJUNCTION. Signed by Judge Claudia Wilken on 6/26/09. (cwlc2, COURT STAFF) (Filed on 6/26/2009) (Entered: 06/26/2009)

6/26/2009 131 ORDER by Judge Claudia Wilken granting 5 Motion for Preliminary Injunction (cwlc2, COURT STAFF) (Filed on 6/26/2009) (Entered: 06/26/2009)

6/29/2009 138 NOTICE OF APPEAL as to 130 Preliminary Injunction, 131 Order on Motion for Preliminary Injunction by John Chiang, David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner. (cp, COURT STAFF) (Filed on 6/29/2009) (Entered: 06/30/2009)

7/13/2009 171 AMENDED PRELIMINARY INJUNCTION by Judge Claudia Wilken (cwlc3, COURT STAFF) (Filed on 7/13/2009) Modified on 7/14/2009 (cp, COURT STAFF). (Entered: 07/13/2009)

7/13/2009 172 ORDER CLARIFYING INJUNCTION AND DENYING re 144

MOTION FOR CIVIL CONTEMPT SANCTIONS filed by [Lydia Dominguez, et al.] (cwlc3, COURT STAFF) (Filed on 7/13/2009) Modified on 7/14/2009 (cp, COURT STAFF). (Entered: 07/13/2009)

7/23/2009 202 AMENDED NOTICE OF APPEAL as to 171 Order on Motion for Sanctions, 172 Order[,] 130 Preliminary Injunction, 131 Order on Motion for Preliminary Injunction by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner. Appeal Record due by 8/24/2009. (Zwibelman, Michael) (Filed on 7/23/2009) Modified on 7/24/2009 (cp, COURT STAFF). (Entered: 07/23/2009)

7/24/2009 203 ORDER FURTHER CLARIFYING INJUNCTION. Signed by Judge Claudia Wilken on 7/24/09. (scc, COURT STAFF) (Filed on 7/24/2009) (Entered: 07/24/2009)

7/28/2009 205 AMENDED NOTICE OF APPEAL as to 171 Order on Motion for Sanctions, 172 Order[,] 130 Preliminary Injunction, 203 Order, 131 Order on Motion for Preliminary Injunction by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner (SECOND AMENDED NOTICE). Filing fee $455. Appeal Record due by 8/27/2009. (Zwibelman, Michael)

(Filed on 7/28/2009) (Entered: 07/28/2009)

8/13/2009 212 **ANSWER** to Complaint by John Chiang, David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner. (Carson, Susan) (Filed on 8/13/2009) Modified on 8/14/2009 (jlm, COURT STAFF). (Entered: 08/13/2009)

3/3/2010 262 OPINION of USCA as to 138 Notice of Appeal filed by David Maxwell-Jolly, John Chiang, Arnold Schwarzenegger, John A. Wagner, 205 Amended Notice of Appeal, filed by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner, 202 Amended Notice of Appeal, filed by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner (cp, COURT STAFF) (Filed on 3/3/2010) (Entered: 03/03/2010)

3/25/2010 267 MANDATE of USCA; cost is awarded to the appellee in the amount of $316.90 as to 138 Notice of Appeal, 205 Amended Notice of Appeal, 202 Amended Notice of Appeal, filed by David Maxwell-Jolly, Arnold Schwarzenegger, John A. Wagner (cp, COURT STAFF) (Filed on 3/25/2010) (Entered: 03/25/2010)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Dominguez v. Schwarzenegger*, No. 09-16359

Date	No.	Docket Text
7/1/2009	7	Filed Appellants Civil Appeals Docketing Statement. Served on 06/29/2009. [6978769] (JFF)
08/07/2009	31	Submitted (ECF) Opening brief for review. Submitted by Appellants John Chiang, David Maxwell-Jolly, Arnold Schwarzenegger and John A. Wagner. Date of service: 08/07/2009. [7020506] (GDB)
8/12/2009	33	Filed clerk order: Opening Brief [31] filed by John Chiang, Arnold Schwarzenegger, David Maxwell-Jolly and John A. Wagner. * * * [7025298] (GLS)
8/20/2009	49	Filed Appellants John Chiang, David Maxwell-Jolly, Arnold Schwarzenegger and John A. Wagner excerpts of record in 4 volumes. [7150142] (PANEL) (FT)
9/4/2009	37	Filed Appellees Mikesha Martinez, Herbert M. Meyer, Service Employees International Union California State Council, Service Employees International Union Local 521, Service Employees International Union United Health Care Workers West, Service Employees International Union United Long-Term Care

		Workers and Willie Beatrice Sheppard supplemental excerpts of record on appeal in 2 volumes. [7053194] (FT)
9/4/2009	38	Submitted (ECF) Answering brief for review. Submitted by Appellees [Lydia Dominguez, et al.]. Date of service: 09/04/2009. [7053252] – [COURT UPDATE: Changed type of brief. 09/08/2009 by ASW] (SL)
9/4/2009	40	Filed Appellees' supplemental excerpts of record on appeal in 2 volumes. [7053660] (LA)
9/8/2009	39	Filed clerk order: Answering Brief filed by Appellees. * * * [7053642] (LA)
9/18/2009	42	Submitted (ECF) Reply brief for review. Submitted by Appellants John Chiang, David Maxwell-Jolly, Arnold Schwarzenegger and John A. Wagner. Date of service: 09/18/2009. [7067399] (SMC)
9/18/2009	43	Filed clerk order: Reply Brief filed by John Chiang, Arnold Schwarzenegger, David Maxwell-Jolly and John A. Wagner. * * * [7067446] (LA)
1/19/2010	57	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.. [7199057] (LN)

3/3/2010	60	FILED OPINION (STEPHEN R. REINHARDT, WILLIAM A. FLETCHER and MILAN D. SMITH, JR.) AFFIRMED. Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [7250565] (RP)
3/24/2010	63	MANDATE ISSUED. (SR, WAF and MDS) Cost awarded to APPELLEE in the amount of $316.90. [7277067] (TB)

Relevant Docket Entries in the United States District Court for the Northern District of California, *Santa Rosa Memorial Hospital v. Maxwell-Jolly*, No. CV 08-5173 SC

Date	No.	Docket Text
11/14/2008	1	COMPLAINT /no process against Sandra Shewry (Filing fee $350, receipt number 34611025556.). Filed by [Santa Rosa Memorial Hospital, et al.]. (ga, COURT STAFF) (Filed on 11/14/2008) (Entered: 11/17/2008)
12/4/2008	7	AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF against Sandra Shewry. Filed by [Santa Rosa Memorial Hospital, et al.]. (Johnson, Dean) (Filed on 12/4/2008) (Entered: 12/04/2008)
1/14/2009	11	MOTION for Preliminary Injunction filed by [Santa Rosa Memorial Hospital, et al.]. Motion Hearing set for 2/20/2009 10:00 AM in Courtroom 1, 17th Floor, San Francisco. (Attachments: * * *) (Johnson, Dean) (Filed on 1/14/2009) (Entered: 01/14/2009)
1/22/2009	13	ANSWER to Amended Complaint by Sandra Shewry. (Zwibelman, Michael) (Filed on 1/22/2009) (Entered: 01/22/2009)
1/30/2009	17	Memorandum in Opposition re 11 MOTION for Preliminary Injunction filed by Sandra Shewry.

		(Attachments: * * *) (Zwibelman, Michael) (Filed on 1/30/2009) (Entered: 01/30/2009)
2/6/2009	21	Reply in Support of 11 Preliminary Injunction filed by [Santa Rosa Memorial Hospital, et al.]. (Attachments: * * *) (Johnson, Dean) (Filed on 2/6/2009) Modified on 2/9/2009 (aaa, Court Staff). (Entered: 02/06/2009)
2/23/2009	30	ORDER by Judge Samuel Conti denying Motion for Preliminary Injunction and Staying Case (sclc2, COURT STAFF) (Filed on 2/23/2009) (Entered: 02/23/2009)
3/3/2009	31	NOTICE OF APPEAL as to 30 Order on Motion for Preliminary Injunction on the Pleadings by Anaheim Memorial Medical Center. Filing fee $455.00., Receipt Number 34611029525 (aaa, Court Staff) (Filed on 3/3/2009) (Additional attachment(s) added on 3/13/2009: # 1 USCA NUMBER: 09-15434) (aaa, Court Staff). (Entered: 03/05/2009)
6/2/2009	45	ORDER of USCA: VACATED AND REMANDED; as to 31 Notice of Appeal, filed by Anaheim Memorial Medical Center (aaa, COURT STAFF) (Filed on 6/2/2009) (Entered: 06/02/2009)

6/4/2009	47	ORDER re Supplemental Briefing (sclc2, COURT STAFF) (Filed on 6/4/2009) (Entered: 06/04/2009)
6/12/2009	48	Supplemental Memorandum to Enjoin AB 5; Exhibits 1-5; in Response to 6/4/2009 Court Order filed by [Santa Rosa Memorial Hospital, et al.]. (Johnson, Dean) (Filed on 6/12/2009) Modified on 6/15/2009 (aaa, COURT STAFF). (Entered: 06/12/2009)
6/17/2009	49	RESPONSE to re 47 Order by Sandra Shewry. (Attachments: * * *) (Zwibelman, Michael) (Filed on 6/17/2009) (Entered: 06/17/2009)
6/19/2009	50	Reply to Opposition filed by [Santa Rosa Memorial Hospital, et al.]. (Sorgen, Michael) (Filed on 6/19/2009) (Entered: 06/19/2009)
6/25/2009	52	MANDATE of USCA: The judgment of this Court, entered 6/1/09, takes effect this date. This constitutes the formal mandate of this Court; as to 31 Notice of Appeal, filed by Anaheim Memorial Medical Center (aaa, COURT STAFF) (Filed on 6/25/2009) (Entered: 06/25/2009)
6/26/2009	54	ORDER (sclc2, COURT STAFF) (Filed on 6/26/2009) (Entered: 06/26/2009)
9/9/2009	59	ORDER LIFTING STAY; SETTING NEW BRIEFING SCHEDULE.

		Signed by Judge Samuel Conti on 9/9/2009. (sclc2, COURT STAFF) (Filed on 9/9/2009) (Entered: 09/09/2009)
10/12/2009	60	Amended MOTION for Preliminary Injunction; Notice of Motion; Memorandum of Points and Authorities filed by [Santa Rosa Memorial Hospital, et al.]. Motion Hearing set for 11/20/2009 10:00 AM in Courtroom 1, 17th Floor, San Francisco. (Attachments: * * *) (Johnson, Dean) (Filed on 10/12/2009) (Entered: 10/12/2009)
10/30/2009	61	Memorandum in Opposition re 60 Amended MOTION for Preliminary Injunction; Notice of Motion; Memorandum of Points and Authorities filed by Sandra Shewry. (Attachments: * * *) (Zwibelman, Michael) (Filed on 10/30/2009) (Entered: 10/30/2009)
11/6/2009	64	Reply to Opposition re 60 Amended MOTION for Preliminary Injunction; Notice of Motion; Memorandum of Points and Authorities filed by [Santa Rosa Memorial Hospital, et al.]. (Attachments: * * *) (Johnson, Dean) (Filed on 11/6/2009) (Entered: 11/06/2009)
11/12/2009	65	MOTION for Leave to File Surreply in Further Opposition to Amended Preliminary Injunction Motion filed by Sandra Shewry. (Attachments:

* * *) (Zwibelman, Michael) (Filed on 11/12/2009) (Entered: 11/12/2009)

11/16/2009 66 Reply Memorandum re 65 MOTION for Leave to File Surreply in Further Opposition to Amended Preliminary Injunction Motion filed by [Santa Rosa Memorial Hospital, et al.]. (Attachments: * * *) (Johnson, Dean) (Filed on 11/16/2009) (Entered: 11/16/2009)

11/16/2009 67 ORDER by Judge Samuel Conti granting 65 Motion for Leave to File Surreply in Further Opposition to Amended Preliminary Injunction Motion (tdm, COURT STAFF) (Filed on 11/16/2009) (Entered: 11/16/2009)

11/18/2009 68 ORDER by Judge Samuel Conti granting 60 Motion for Preliminary Injunction (sclc2, COURT STAFF) (Filed on 11/18/2009) (Entered: 11/18/2009)

11/19/2009 71 ORDER STAYING PRELIMINARY INJUNCTION AND CASE. Signed by Judge Samuel Conti on 11/19/2009. (sclc2, COURT STAFF) (Filed on 11/19/2009) (Entered: 11/19/2009)

11/19/2009 72 NOTICE OF APPEAL as to 68 Order on Motion for Preliminary Injunction by Sandra Shewry. Filing fee $455.00. Receipt Number 34611039124 (aaa, COURT STAFF) (Filed on 11/19/2009) (Additional attachment(s) added on

11/30/2009: # 1 USCA NUMBER: 09-17633) (aaa, COURT STAFF). (Entered: 11/20/2009)

12/2/2009 80 ORDER by Judge Samuel Conti granting 77 Ex Parte Application to Vacate Stay of Preliminary Injunction and Restoring Preliminary Injunction (sclc2, COURT STAFF) (Filed on 12/2/2009) (Entered: 12/02/2009)

12/10/2009 83 ORDER by Judge Samuel Conti denying 81 Motion for Order to Show Cause; Clarifying Preliminary Injunction (sclc2, COURT STAFF) (Filed on 12/10/2009) (Entered: 12/10/2009)

12/16/2009 89 AMENDED NOTICE OF APPEAL as to 68 Order on Motion for Preliminary Injunction, 88 Order, 80 Order on Ex Parte Application, 83 Order on Motion for Order to Show Cause by Sandra Shewry. Filing fee $455. (Zwibelman, Michael) (Filed on 12/16/2009) (Additional attachment(s) added on 9/8/2010: # 1 Petition for Writ of Certi[o]rari: Case Number 10-283) (aaa, COURT STAFF). (Entered: 12/16/2009)

6/4/2010 92 USCA Memorandum: AFFIRMED; as to 89 Amended Notice of Appeal, filed by Sandra Shewry, 72 Notice of Appeal, filed by Sandra Shewry (aaa, COURT STAFF) (Filed on 6/4/2010) (Entered: 06/04/2010)

6/30/2010	93	MANDATE of USCA: The judgment of this Court, entered May 27, 2010, takes effect this date. This constitutes the formal mandate of this Court. FOR THE COURT; as to 89 Amended Notice of Appeal, filed by Sandra Shewry, 72 Notice of Appeal, filed by Sandra Shewry (aaa, COURT STAFF) (Filed on 6/30/2010) (Entered: 06/30/2010)

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit, *Santa Rosa Memorial Hospital v. Maxwell-Jolly*, No. 09-17633

11/24/2009	5	Filed Appellant Sandra Shewry Civil Appeals Docketing Statement. Served on 11/19/2009. [7143452] (CW)
12/17/2009	6	Submitted (ECF) Opening brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 12/17/2009. [7167504] (MAZ)
12/17/2009	10	Filed Appellant David Maxwell-Jolly excerpts of record in 7 volumes. With Volume 1-A. Served on 12/17/2009. [7168545] (WP)
12/18/2009	9	Filed clerk order: The opening brief [6] submitted by David Maxwell-Jolly is filed. * * * [7168541] (WP)
1/10/2010	13	Submitted (ECF) Answering brief for review. Submitted by Appellees [Santa Rosa Memorial Hospital, et al.]. Date of service: 01/10/2010. [7188837] (DLJ)
1/12/2010	14	Filed clerk order: The answering brief [13] submitted by [Santa Rosa Memorial Hospital, et al.] is filed. * * * [7192521] (PK)
1/25/2010	16	Submitted (ECF) Reply brief for review. Submitted by Appellant David Maxwell-Jolly. Date of service: 01/25/2010. [7207411] (MAZ)

1/27/2010	17	Filed clerk order: The reply brief [16] submitted by David Maxwell-Jolly is filed. * * * [7210407] (PK)
5/12/2010	22	ARGUED AND SUBMITTED TO PROCTER R. HUG, PAMELA ANN RYMER and M. MARGARET MCKEOWN. [7334798] (AN)
5/27/2010	23	FILED MEMORANDUM DISPOSITION (PROCTER R. HUG, PAMELA ANN RYMER and M. MARGARET MCKEOWN) AFFIRMED. FILED AND ENTERED JUDGMENT. [7351898] (DD)
6/18/2010	25	MANDATE ISSUED. (PRH, PAR and MMM) [7377208] (SW)

EDMUND G. BROWN JR.
Attorney General of the State of California
RICHARD T. WALDOW
Supervising Deputy Attorney General
JENNIFER M. KIM
Supervising Deputy Attorney General
PHILLIP J. MATSUMOTO, State Bar No. 140386
Deputy Attorney General
TARA L. NEWMAN, State Bar No. 210960
Deputy Attorney General
SARA UGAZ, State Bar No. 239031
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2463
Fax: (213) 897-2805
Email: Sara.Ugaz@doj.ca.gov
Attorneys for Respondents Sandra Shewry, Director of the California Department of Health Care Services, and the California Department of Health Care Services

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, a nonprofit corporation; GRAY PANTHERS OF SACRAMENTO, a nonprofit corporation; GRAY PANTHERS OF SAN FRANCISCO, a nonprofit corporation;	Case No. **CV08-03315** (Los Angeles Superior Court Case No. BS114459) **RESPONDENTS' NOTICE OF REMOVAL OF ACTION UNDER**

GERALD SHAPIRO, Pharm.D. doing business as Uptown Pharmacy and Gift Shoppe; SHARON STEEN, doing business as Central Pharmacy; MARK BECKWITH; and MARGARET DOWLING, TRAN PHARMACY, INC., AND JASON YOUNG, Petitioners, v. **SANDRA SHEWRY, Director of the Department of Health Care Services, State of California; CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,** Respondents.	**42 U.S.C. § 1441(b)** (Filed May 19, 2008)

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that Respondents Sandra Shewry, Director of the California Department of Health Care Services, and the California Department of Health Care Services, hereby remove to this Court the state court action described below:

1. On April 22, 2008, Petitioners filed a Verified Petition for Writ of Mandamus in the Superior Court of California, in and for the County of Los Angeles,

entitled "Independent Living Center of Southern California, a nonprofit corporation; Gray Panthers of Sacramento, a nonprofit corporation; Gray Panthers of San Francisco, a nonprofit corporation; Gerald Shapiro, Pharm.D. doing business as Uptown Pharmacy and Gift Shoppe; Sharon Steen, doing business as Central Pharmacy; Mark Beckwith; and Margaret Dowling, Petitioners, vs. Sandra Shewry, Director of the Department of Health Care Services, State of California; California Department of Health Care Services, Respondents" as case number BS114459.

2. In their Verified Petition for Writ of Mandamus, Petitioners, who are health care advocates and Medi-Cal providers and recipients, seek to enjoin Respondents from implementing a 10% reduction in Medi-Cal payments to Medi-Cal providers. Petitioners allege that the proposed reduction, which is planned to go into effect on July 1, 2008, violates the Medicaid Act, namely 42 U.S.C. § 1396a subd. (a)(30)(a), the Americans with Disabilities Act of 1990, and the Social Security Act, among other things.

3. Respondents Sandra Shewry, Director of the California Department of Health Care Services, and the California Department of Health Care Services were served with copies of the Verified Petition for Writ of Mandamus on April 22, 2008.

4. On May 12, 2008, Petitioners filed a Verified First Amended Petition for Writ of Mandamus and a Memorandum in Support of Writ of Mandamus, or in the Alternative, For Permanent or Preliminary

Injunction. The Amended Petition added Petitioners Tran Pharmacy, Inc. and Jason Young. Respondents were served on May 12, 2008 with the Verified First Amended Petition for Writ of Mandamus and the Memorandum in Support of Writ of Mandamus, or in the Alternative, For Permanent or Preliminary Injunction. Petitioners again allege that Respondents violated the Medicaid Act, namely 42 U.S.C. § 1396a subd. (a)(30)(a), the Americans with Disabilities Act of 1990, and the Social Security Act, among other things.

5. On or around May 15, 2008, Petitioners filed an Ex Parte Application for Alternative Writ of Mandamus under California Code of Civil Procedure section 1085 to immediately enjoin Respondents from implementing the 10% reduction in Medi-Cal payments to Medi-Cal providers. The hearing on this application is set for May 20, 2008 at 8:30 a.m. at the Los Angeles Superior Court before the Honorable James C. Chalfant in Department 85.

6. Under 28 U.S.C. § 1331, this civil action is within the original jurisdiction of this Court. Respondents may remove this case to this Court under 28 U.S.C. § 1441(b) because Plaintiff alleges that Respondents violated federal laws, namely the Medicaid Act, the Americans with Disabilities Act, and the Social Security Act.

7. Under 28 U.S.C. § 1446(a), attached are true and correct copies of the state-court file in this case, as served on Respondents:

a. **Exhibit A: Verified Petition for Writ of Mandamus.**

b. **Exhibit B: Civil Case Cover Sheet.**

c. **Exhibit C: Civil Case Cover Sheet Addendum and Statement of Location.**

d. **Exhibit D: Verified First Amended Petition for Writ of Mandamus.**

e. **Exhibit E: Petitioners' Memorandum in Support of Writ of Mandamus, or in the Alternative, For Permanent or Preliminary Injunction.**

f. **Exhibit F: Petitioners' Notice of Ex Parte Application and Ex Parte Application for Alternative Writ of Mandamus Under § 1085 Cal. Code of Civil Procedure with supporting documentation**

Dated: May 19, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California
RICHARD T. WALDOW
Supervising Deputy Attorney General
JENNIFER M. KIM
Supervising Deputy Attorney General
PHILLIP J. MATSUMOTO
Deputy Attorney General
TARA L. NEWMAN
Deputy Attorney General

/s/ Sara Ugaz
SARA UGAZ
Deputy Attorney General
Attorneys for Respondents
Sandra Shewry, Director of the
California Department of
Health Care Services, and the
California Department of
Health Care Services

* * *

EXHIBIT - D

LYNN S. CARMAN, State Bar 028860
Medicaid Defense Fund
28 Newport Landing Dr.
Novato, CA 94949-8214
Telephone: (415) 927-4023
Facsimile: (415) 499-1687

STANLEY L. FRIEDMAN, State Bar 120551
445 S. Figueora St., 27th Floor
Los Angeles, CA 90071-1631
Telephone: (213) 629-1500
Facsimile: (213) 489-6899

Attorneys for Petitioners Independent Living Center of Southern California; Gray Panthers of Sacramento; Gray Panthers of San Francisco; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc. dba Tran Pharmacy; and Jason Young

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, UNLIMITED JURISDICTION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, a nonprofit corporation; GRAY PANTHERS OF SACRAMENTO, a nonprofit corporation; THE GRAY PANTHERS OF SAN FRANCISCO, a nonprofit corporation; GERALD SHAPIRO, Pharm.D., doing business as Uptown Pharmacy and Gift Shoppe; SHARON STEEN, doing business as Central Pharmacy; MARK BECKWITH; MARGARET DOWLING; TRAN PHARMACY, INC., a corporation, doing business as Tran Pharmacy; and JASON YOUNG,

-vs.-

SANDRA SHEWRY, Director of Department of Health Care Services of the State of California; DEPARTMENT OF HEALTH CARE SERVICES, a department of the State of California; and DOES 1 through 50,.

Respondents. /

No. BS 114459

VERIFIED FIRST AMENDED PETITION FOR WRIT OF MANDAMUS

VERIFIED FIRST AMENDED PETITION FOR WRIT OF MANDAMUS
(§ 1085 Code of Civil Procedure)

TO THE ABOVE-ENTITLED HONORABLE COURT:

The verified first amended petition for writ of mandamus, under § 1085 Code of Civil Procedure, of petitioners Independent Living Center of Southern California, Inc.; Gray Panthers of Sacramento; The Gray Panthers of San Francisco; Gerald Shapiro, Pham.D., [sic] dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc., dba Tran Pharmacy; and Jason Young, respectfully shows:

Jurisdiction and Venue[1]

1. The above-entitled Superior Court has jurisdiction under Article VI, section 10, California Constitution, and § 1085 Code of Civil Procedure ("Code Civ. Proc."). Venue lies under § 401 Code Civ. Proc. which provides that an action may be filed against an officer or agency of the State of California in any county in which the California Attorney General has an office; and under § 393(b) Code Civ. Proc., which provides that an action may be filed in a county in which a public officer has an office.

---

[1] Headings and captions are not allegations, and need not be traversed or denied; but, are set forth only to assist the reader.

Parties

2. (a) The petitioner INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC. ("ILCSCal") is a nonprofit California corporation which was duly organized and incorporated in California on July 25, 1977 pursuant to the General Nonprofit Corporation Law of the State of California.

(b) ILCSCal has its principal office and place of business in, and does business in the County of Los Angeles, California.

3. The petitioner GRAY PANTHERS OF SACRAMENTO ("Gray Panthers Sacto") is a California nonprofit public benefit corporation, whose principal office and place of business is, and does business, in the County of Sacramento, California.

4. (a) The petitioner THE GRAY PANTHERS OF SAN FRANCISCO ("Gray Panthers SF") is a nonprofit California corporation which was duly organized and incorporated in California on August 28, 1978, pursuant to the General Nonprofit Corporation Law of the State of California.

(b) GRAY PANTHERS SF has its principal office and place of business in, and does business, in the City and County of San Francisco, California.

5. (a) The petitioner GERALD SHAPIRO, Pharm.D., is a duly licensed registered pharmacist with License No. 24377, who owns and operates a duly licensed retail pharmacy under the fictitious name of Uptown Pharmacy & Gift Shoppe, under

retail pharmacy license No. PHY 41615, in the City of Los Angeles, California.

(b) The petitioner SHAPIRO's pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans, under Medi-Cal provider identification No. PHA 416150.

6. (a) The petitioner SHARON STEEN is an individual who is a copartner in a copartnership which owns and operates a licensed retail pharmacy, under the fictitious name Central Pharmacy, under retail pharmacy license No. PHY 38051, in the City of Santa Monica, California.

(b) The petitioner STEEN's pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans, under Medi-Cal provider identification No. PHA 380510.

7. The petitioners MARK BECKWITH, MARGARET DOWLING, and JASON YOUNG are individuals who are recipients in the state-federal Medicaid program in California (which is called "Medi-Cal").

8. (a) The Petitioner TRAN PHARMACY, INC. is California corporation which owns and operates a duly licensed retail pharmacy under the fictitious name of Tran Pharmacy, under retail pharmacy license No. PHY 43647, in Garden Grove, California.

(b) The TRAN PHARMACY, INC.'s pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans,

under Medi-Cal provider identification No. PHA 436470.

9. (a) The respondent DEPARTMENT OF HEALTH CARE SERVICES ("Department") is a department of the State of California. The Department administers the Medi-Cal program under § 14000 et seq. California Welfare and Institutions ("Welf. & Inst.") Code. The Department has an office in the County of Los Angeles, California.

(b) The respondent SANDRA SHEWRY ("Director"), is the director of the Department. The Director is exclusively empowered by § 14100.1 and 14105 Welf. & Inst. Code to set all policies, rules and regulations in the Medi-Cal program, including all rates payable to Medi-Cal providers. The Director has an office in the County of Los Angeles. The Director SANDRA SHEWRY is sued in her official capacity, only.

(c) Respondents DOES 1 through 50 are persons and officers whose identity is unknown to petitioners, and who are agents, officers, and servants of the State of California, and who have some function, unknown to petitioners at this time, to assist or to carry out the actions of the respondents complained of in this Petition. Petitioners pray leave of the Court to amend this Petition as and when the identity and functions of DOES 1 through 50 become known to the petitioners.

STANDING

Purposes of the Gray Panther petitioners

10. The membership of each of the Gray Panthers Sacto and of the Gray Panthers SF, respectively, is predominantly over the age of 50. A primary function and purpose of the Gray Panthers Sacto, and of the Gray Panthers SF, respectively, is to advocate and advance the health care and the health care rights and civil rights of their members, (1) a number of whom are Medi-Cal recipients in the Medi-Cal fee-for-services program, (2) a number of whom are Medi-Cal recipients in Medi-Cal managed care plans.

Suit as authorized by Green v. Obledo and the common law

11. (a) The petitioners MARK BECKWITH, MARGARET DOWLING, GERALD SHAPIRO, Pharm.D, SHARON STEEN, and JASON YOUNG are each citizens and residents of the State of California. The ILCSCal, the Gray Panthers Sacto, the Gray Panthers SF, and the Tran Pharmacy, Inc., dba Tran Pharmacy, are also each a corporate citizen and resident of the State of California.

(b) Each of the petitioners, mentioned the preceding sub-Paragraph (a) of Paragraph 11, sue on their own behalf In their own interest, respectively, as well as, also, on behalf of the public of the State of California, to procure the performance by the respondent public officials of public duty, as authorized by *Green v. Obledo,* 29 Cal.3d 126 (1981); namely, the

performance of the mandatory ministerial duty (1) to set aside their policy to implement Sections 14 and 15 of Assembly Bill X3 5 (enacted and eff. Feb. 16, 2008, at Chapter 3, Statutes 2007-2008 Third Extraordinary Session), and (2) to refrain from implementing Sections 14 and 15 of Assembly Bill X3 5, including refraining from reducing payments 10% to Medi-Cal doctors, dentists, pharmacies, those acute care hospitals who have no contract with the Department, and, other providers in the Medi-Cal fee-for-service program, and Medi-Cal managed care plans, commencing July 1, 2008; – which aforesaid actions of the respondents are preempted, under the Supremacy Clause, (article VI, U.S. Constitution), in that the aforesaid actions:

> – (1) violate 42 U.S.C. § 1396a(a)(30)(A), (herein, "Sec. 30(A)," including the quality and access clauses of Sec. 30(A).
>
> – (2) violate the federal Americans with Disabilities Act of 1990, ("ADA");

which suit is permitted and authorized by all laws made and provided therefor, the common law, and by *Green v. Obledo* (1981) 29 Cal.3d 126.

Prudential *jus tertii* suits

12. (a) Each of the pharmacy petitioners, (namely, the Uptown Pharmacy, Central Pharmacy, and Tran Pharmacy, (and their owners who are the plaintiffs Gerald Shapiro, Pharm.D., Sharon Steen, and the Tran Pharmacy, Inc.), also sue in a prudential

jus tertii capacity to assert, respectively, the interests of their respective Medi-Cal beneficiary patients, as well as the interests of their patients with disabilities, in the causes of action, claims, Supremacy Clause preemption, and relief which is sued upon and sought in the within case.

(b) The petitioner ILCSCal also sues in a prudential *jus tertii* capacity, in its capacity as an independent living center, – designated and organized as such, and with purposes and powers therefore, under and as authorized by the state Rehabilitation Act, § 19800 et seq. Welf. & Inst. Code, – to assert the interests of its clients who are Medi-Cal beneficiary patients, as well as the interests of its clients with disabilities, in the causes of action, claims, Supremacy Clause preemption, and relief which is sued upon and sought in the within case.

(c) The petitioners Gray Panthers Sacto and Gray Panthers SF also sue in a prudential *jus tertii* capacity, respectively, to assert the interests of their respective members who are Medi-Cal beneficiary patients, as well as the interests of their members clients with disabilities, in the causes of action, claims, Supremacy Clause preemption, and relief which is sued upon and sought in the within case.

13. Each of the respondents Gerald Shapiro and Sharon Steen, and the Tran Pharmacy, Inc., a resident California corporation, also sue on all Causes of Action herein in their capacity as citizen resident taxpayers of the State of California, under the

common law and under § 526a, Code Civ. Proc., – in that each is a taxpayer who has been assessed and paid a state income tax, within 12 months on the filing of this *Verified First Amended Petition for Writ of Mandamus,* to the State of California.

14. Each of the petitioners, – as well as each of the patients, clients, and members in respect to whom the pharmacy plaintiffs, the ILCSCal, and the Gray Panthers petitioners are prudential *jus tertii* representatives, – also has standing inasmuch as each has suffered, will suffer, and is threatened to be caused to suffer, concrete and irreparable injury as shall hereinafter be specified, unless respondents are restrained by a writ of mandamus from implementing the statutes which are preempted, under the Supremacy Clause, by Sec. 30(A), and by the ADA, as set forth hereinafter.

FACTS COMMON TO ALL CLAIMS

15. The petitioner MARK BECKWITH was born on October 5, 1957, in Corry, Pennsylvania. He is a citizen and resident of the State of California who resides at [Home Address Omitted]. He is a paraplegic on account of spinal muscular atrophy, who requires oxygen at all times, who receives medical and pharmacy services under the Medi-Cal program. He is a SSI recipient who receives $870 monthly from SSI. His Medi-Cal identification number is [REDACTED]

16. The petitioner MARGARET DOWLING was born in Sandusky, Ohio, on July 29, 1940. She is a citizen and resident of the State of California who resides at [Home Address Omitted]. She is a paraplegic who receives part of her medical services under the Medi-Cal program. Her Medi-Cal identification number is [REDACTED].

17. The petitioner JASON YOUNG was born in Inglewood, California on July 15, 1962. He is a citizen and resident of the State of California who resides at [Home Address Omitted]. He suffers disabilities of blindness and brain damage and is a Supplemental Security Income (SSI) recipient, with SSI identification number of [Social Security Number Omitted]. He receives assistive services from In-Home Supportive Services and medical and other health services from the Medi-Cal managed care program. His Medi-Cal identification number is [REDACTED]

18. – (a) The ILCSCal is a non-profit corporation located in Van Nuys, Santa Clarita and Lancaster, California. The amended articles of incorporation of ILCSCal state that its primary purposes are to:

> " . . . initiate, sponsor, promote, and carry out plans, policies, and activities that will further the prosperity of and enhance the development of persons with disabilities."

The ILCSCal is a designated center for independent living (CIL). CILs are community-based organizations established under the California Rehabilitation Act (§ 19800 Welf. & Inst. Code) to advocate for and

provide services to enable people with disabilities to achieve independence, including equal access to society and to all activities of society.

– (b) The ILCSCal works on issues of benefits counseling, cross-disability peer modeling/ peer counseling, housing referrals, personal assistants referrals, advocacy, and providing technical assistance, information and referral and emergency services, and assistance in locating medical, pharmacy, and other providers to treat, cure, and alleviate their illness, injury, or condition.

19. The ILCSCal serves over 8,000 individuals with disabilities annually, the majority of whom, (96% or more than 7,500), are categorically linked to Medi-Cal as their primary insurance type, because they are SSI beneficiaries under the Social Security Act; and as such, are not mandated into Medi-Cal managed care, so that most of the clients of ILCSCal who receive SSI are not enrolled in Medi-Cal managed care, and instead receive their Medi-Cal services, including physician, dental, and pharmacy services, from fee-for-service Medi-Cal providers.

– (c) Out of these 7,500 clients with disabilities served annually by ILCSCal, approximately 15%, or 1,200, are eligible for both Medi-Cal and Medicare Part B, and as such:

– (1) receive their physician under Medicare, (*except* for such physician services which are not covered by Medicare, *in which case Medi-Cal pays for the physician service*), and, also receive their

pharmacy services under Medicare Part D, (except for certain "carve out" drug products which are excluded from Medicare Part D and are instead dispensed under the Medi-Cal program); and,

– (2) receive their dental care under Medi-Cal fee-for-service.

LEGISLATIVE HISTORY OF ASSEMBLY BILL X3 5

20. On January 10, 2008, the California Governor proclaimed a State fiscal emergency, sent a proposed 2008-2009 budget bill to the Legislature, and called the Legislature into special session.

21. (a) On February 16, 2008 the Governor signed into law the Special Session Budget Bill, (Assembly Bill X3), and, also, Assembly Bill X3 5 (the Special Session health care trailer bill), and Assembly Bill X3 6 (the Special Session human services trailer bill).

(b) Assembly Bill X3 5, eff. February 16, 2008, was chaptered as Chapter 3, Statutes 2007-2008 Third Extraordinary Session.

Assembly Bill X3 5

22. Section 14 of Assembly Bill X3 5 added §14105.19 Welf. & Inst. Code, which:

– in subds. (a), (b)(1), (b)(2), and (c) – (e) provides that reimbursement shall be cut 10% across-the-board

in Medi-Cal fee-for-service to physicians, dentists, pharmacies, skilled nursing facilities, acute care hospitals (in respect to inpatient hospital services) who have no contract with the Department, and other providers in the Medi-Cal fee-for-service program, for services for dates of service on and after July 1, 2008; and,

– in subd. (b)(3) provides that payments shall be reduced by the actuarial equivalent amount specified in subd. (b) of § 14105.9 Welf. & Inst. Code, (i.e., an amount of 10%), to Medi-Cal managed care plans, which reduction is to be effected pursuant to contract amendments or change orders effective on July 1, 2008.

23. Section 15 of Assembly Bill X3 5 added §14105.245 Welf. & Inst. Code, which provides that amounts paid interim payments to acute care hospitals not under contract with the Department, for amounts paid as interim payments for inpatient hospital services covered by Medi-Cal, shall also be cut 10% across-the-board in Medi-Cal fee-for-service for acute care hospitals who have no contract with the Department for fiscal year 2008-09, (commencing July 1, 2008).

24. § 14105.245 Welf. & Inst. Code, (added by Section 15 of Assembly Bill X3 5 as set forth above), provides:

> "(a) The Legislature finds and declares that the state *faces a fiscal crisis that requires unprecedented measures to be taken to reduce*

General Fund expenditures to avoid reducing vital government services necessary for the protection of the health, safety, and welfare of the citizens of the State of California." (Emphasis supplied.)

25. Finally, Secs. 16 and 17 of Assembly Bill X3 5 provide:

"SEC. 16. This act *addresses the fiscal emergency declared by the Governor* by proclamation on January 10, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 17.... In order to make statutory changes *needed to implement cost containment measures affecting health services at the earliest possible time*, it is necessary that this act take effect immediately." (Emphasis supplied.)

Concrete injury from implementing Secs. 14 and 15 of Assembly Bill X3 5.

26. Each of the Petitioners, as well as:

– all Medi-Cal recipients who receive provider services in the Medi-Cal fee-for-service program,

– all Medi-Cal recipients enrolled in Medi-Cal managed care plans,

– all Medi-Cal providers in the Medi-Cal fee-for-service program who are subject to the aforesaid 10% cut in Medi-Cal payments,

– all Medi-Cal managed care plans, and,

– all Medi-Cal providers in respect to or with whom Medi-Cal managed care plans have contracted with or arranged for covered Medi-Cal managed care services to be furnished by them, (in respect to whom the managed care plans will foreseeably and inevitably pass through the aforesaid 10% cut commencing July 1, 2008),

will, respectively, and foreseeably and inevitably, suffer concrete injury, and are threatened with concrete injury, and are put at risk of concrete injury, by the aforesaid 10% cut, or the actuarial equivalent thereof, which will be put into effect commencing July 1, 2008 by the respondents, pursuant to their policy to implement the aforesaid Sections 14, and 15 of Assembly Bill X3 5, including, without limitation thereby, (1) the 10% across-the-board reduction in reimbursement to physicians, dentists, pharmacies, acute-care hospitals who have no contract with the Department, and other providers in the Medi-Cal fee-for-service program; and (2) the equivalent actuarial 10% reduction in payments to Medi-Cal managed care plans, commencing July 1, 2008; (hereinafter referred to, collectively, as "the Medi-Cal cuts"); which concrete injury from the Medi-Cal cuts is great, immediate, and irreparable.

Denial of access to physicians, and denial of quality medical services

27. More particularly, it is a fact that Medi-Cal rates for physicians are 61% or less of what Medicare pays for the same physician services; that a 10% cut will reduce reimbursement to Medi-Cal physicians to only 57% of what Medicare would pay; and that as a result of the low Medi-Cal rates, only 55% of primary care physicians and less than 50% or [sic] specialists are willing to participate in the Medi-Cal program, (either in the Medi-Cal fee-for-service program, or in Medi-Cal managed care programs). (1) These facts are verified and reported by the Legislative Analyst in *Analysis of the 2008-2009 Budget Bill,* (Budget Analysis"), citing studies on the subject, at pages C-37 and C-38 of the Budget Analysis; and (2) studies funded by the California Healthcare Foundation, (a respected organization with whom the Department often contracts to provide studies and information to the Department), consistently so report.

28. Further:

– **First.** It is a fact that persons with disabilities such as the petitioners DOWLING, BECKWITH, and YOUNG, and the thousands of disabled clients of the petitioner ILCSCal, and the thousands of home shut-ins to whom petitioner SHAPIRO and STEEN deliver prescriptions in the Medi-Cal fee-for-service program, have more difficulty in locating primary care and specialists who are needed by them to adequately follow and care for their complex medical needs, and

keep them alive, than do Medi-Cal recipients without disabilities.

– **Second.** It is a fact that although Medi-Cal managed care plans do assign a Medi-Cal enrollee to a primary care physician, nevertheless, persons with severe disabilities such as the petitioners DOWLING, BECKWITH, and YOUNG require more complex care, from specialists, than Medi-Cal managed care plans are able to furnish them, due to a shortage of specialists in both Medi-Cal fee-for-service and Medi-Cal managed care.

– **But,** specialists who have the capability to treat and follow the complex needs of disabled persons, – such as the paraplegic DOWLING, the quadriplegic BECKWITH, and the blind and brain damaged YOUNG, – are difficult to find and retain over any period of time, **whether the specialist is being sought** by disabled Medi-Cal recipients in the Medi-Cal fee-for-service program, or by disabled Medi-Cal recipients in Medi-Cal managed care plans.

– This above situation, set forth in this Paragraph, is due to the fact that payment of specialists is so low that **less than 50% of specialists** have Medi-Cal patients; and, those that do, repeatedly state in surveys that they are **not willing to accept new** Medi-Cal patients, (whether they come from the Medi-Cal fee-for-service program or from Medi-Cal managed care plans).

– However, given the facts which are set forth above in this Paragraph, it is inevitable that, if the

Medi-Cal cuts of Sections 14 and 15 of Assembly Bill X3 5 are implemented for dates of service on and after July 1, 2008, that thousands of Medi-Cal recipients in both Medi-Cal fee-for-service and Medi-Cal managed care, – including (1) the petitioners DOWLING, BECKWITH, and YOUNG; (2) the thousands of disabled patients of the petitioner pharmacies (Uptown, Central, and Tran), in Los Angeles and Orange counties, (3) the thousands of disabled clients of the petitioner ILCSCal, and (4) the members of the Sacto Gray Panthers and the SF Gray Panthers who are Medi-Cal recipients, **will be driven,** and will at the least be put at great risk, of being forced into institutions in order to survive, if at all.

Denial of access to dentists, and to quality dental care

29. It is also a fact, which is reflected in court decisions and studies, that because of too-low rates, approximately 90% of dentists refuse to accept Medi-Cal patients. Accordingly, the 10% reduction in Medi-Cal payments to dentists, will simply intensify the denial of access and quality dentistry, which already presently exists.

Denial of access to pharmacy care

30. California pharmacies, both chain pharmacies and independent pharmacies, uniformly earn less than a 10% net profit.

31. Further, it is fact, – as demonstrated by the 2006 survey by Myers & Stauffer of California pharmacy costs to operate, and their costs to acquire prescription drug products, that approximately 27.5% of a typical pharmacy's prescriptions in the Medi-Cal program are single source (brand) drugs; that approximately 36% of the prescriptions are multi-source (generic) drugs; and that approximately 36.2% of the prescriptions are low-priced drugs in respect to which the federal government has set a federal upper limit ("FUL") or Medi-Cal has set a maximum allowable ingredient cost ("MAIC") limit for reimbursing the pharmacy's cost to acquire such FUL or MAIC.

32. However, the figures set forth in this Myers & Stauffer report to the Department are consistent with the fact, – when the 10% payment cut commences July 1, 2008, – that although California pharmacies including the petitioner pharmacies. would still have a **small net profit** on the 36% of their Medi-Cal prescriptions which are multi-source (generic) prescriptions without a Ful [sic] or MAIC cap, nevertheless, they would have a **larger net loss, collectively,** on the 27.5% of their Medi-Cal prescriptions which are single source (brand) and the 36.2% of their Medi-Cal prescriptions which are subject to a FUL or a MAIC cap; so that on the whole that California pharmacies, including the petitioner pharmacies, will not be able to dispense Medi-Cal prescriptions in the Medi-Cal fee-for-service program except at a net loss on the entire bulk of their Medi-Cal prescription business, (brand, generic, and capped prescriptions).

33. Further, Medi-Cal managed care programs, (such as the Medi-Cal county organized health system managed care program in Orange County which is known as "CalOptima"), typically, (including CalOptima) pass through all reductions in payments by Medi-Cal to Medi-Cal managed care plans; so that (1) pharmacies in Medi-Cal managed care plans, including the petitioner pharmacies, and their patients, will suffer the same reduction in ability to furnish or receive quality pharmacy care, and (2) specialists will become even more scare in managed care plans, so that the frail, elderly, disabled Medi-Cal patients in both the Medi-Cal fee-for-service program, and in Medi-Cal managed care plans, will suffer inability, and be put at risk of inability to obtain specialists, and to obtain quality pharmacy services, if the July 1, 2008 10% cut in payment to Medi-Cal managed care plans is not enjoined by the Court.

34. Accordingly, it is manifest, foreseeable and probable, from the foregoing facts set forth above in this Petition, that the 10% reduction in total reimbursement to pharmacies in the Medi-Cal fee-for-service program, (as well as an actuarially equivalent 10% reduction to Medi-Cal managed care plans), will result in not only many, but most independent pharmacies, such as the petitioners GERALD SHAPIRO, Pharm.D., (owner of Uptown Pharmacy in Los Angeles), and SHARON STEEN, (owner of the independent Central Pharmacy in Santa Monica), and the TRAN PHARMACY, either (1) going out of business, or (2) refusing to accept Medi-Cal any longer, or (3) refusing

to fill those particular Medi-Cal prescriptions in respect to which they suffer a net loss in the acquisition and costs to dispense, or (4) reducing staff, hours of pharmacy operation, and eliminating or reducing delivery services to shut-ins, under the new 10% Medi-Cal payment reduction.

35. Further, many independent pharmacies, but few chain pharmacies, deliver Medi-Cal prescriptions to the aged, frail, and disabled Medi-Cal recipients who are shut-in to their homes.

36. For example, 98% of the prescriptions dispensed by the independent Uptown Pharmacy in Los Angeles, – owned by the petitioner GERALD SHAPIRO, Pharm.D., – are deliveries to approximately 5,000 home shut-ins.

37. More particularly, approximately 55% of the shut-ins to whom Uptown Pharmacy delivers prescriptions receive their medications under Medicare Part D, (i.e., those who are 65 or older, or are Social Security Disability Income beneficiaries). But, also, approximately 30% of the shut-in clientele of Uptown Pharmacy are on the Medi-Cal fee-for-service program, due to the fact they are under 65 or, although disabled, have not qualified for S.S.D.I.

38. However, Uptown's net profit on its entire pharmacy business is less than 10% net profit. Accordingly, the petitioner SHAPIRO, – and two other delivery pharmacies whose owners he knows in Los Angeles, – have no realistic choice but to close their pharmacies if the 10% cut in pharmacy reimbursement

is implemented in July 2008; or at the best, eliminate or reduce deliveries. Thus, if the 10% cut is not restrained by the Court, **thousands of disabled home shut-ins** in Los Angeles, (and similar in other parts of the state), who are Medi-Cal recipients, will no longer have **any access** to life-necessary drugs, and, many of them will suffer and die therefrom.

Summary of overall effect of the 10% Medi-Cal cut

39. Accordingly, due to the too-low rates already paid physicians, dentists, pharmacies, and other providers by Medi-Cal, (1) the further 10% payments reduction if implemented in July 2008, to physicians, will drive and tend to drive even more primary care physicians and specialists, and dentists, pharmacies, and other providers out of the Medi-Cal program, or cause them to terminate present provider-patient relationships, or reduce services, or refuse to [sic] new Medi-Cal patients, or increase appointment wait periods; such that (2) many Medi-Cal recipients, both in the Medi-Cal fee-for-service program and in the Medi-Cal managed care program, – and, especially the tens of thousands who are home-bound shut-ins who depend upon medicine delivery, and also those who are disabled, – will be denied access to life-sustaining medical, dental, and prescription services, with (3) the consequence that Medi-Cal recipients in general will be denied quality medical services and access to quality medical services. More particularly, due to the 10% provider payment cuts (including the

actuarial equivalent thereof to Medi-Cal managed care plans, many **disabled Medi-Cal recipients** such as the petitioners DOWLING, BECKWITH, and YOUNG, and the thousands of clients of independent living centers such as the petitioner ILCSCal, will lose, or are threatened with loss, of their primary care and specialist physicians, so that many persons with disabilities, including the petitioners Beckwith and Dowling, will be forced into institutions or will be at risk of being forced into institutions in order to survive, and will suffer injury and pain from untreated illness, injury, or condition.

FIRST CAUSE OF ACTION

By each of the petitioners except petitioner Jason Young, for mandamus and injunctive relief to enjoin each of the respondents to refrain from implementing a 10% reduction of payments to Medi-Cal fee-for-service providers under subds. (a), (b)(1), (b)(2), and (c) – (e) of § 14105.19 Welf. & Inst. Code, and § 14166.245 Welf. & Inst. Code), – which state statutes and the state action of respondents to implement the state statutes violate, and are hence preempted under the Supremacy Clause by, the quality and equal access clauses of 42 U.S.C. § 1396a(a)(30(A).

* * *

40. Petitioners refer to and incorporate each of the allegations in each of the preceding Paragraphs of this Petition, as if fully set forth herein.

41. The Medicaid Act, in 42 U.S.C. § 1396a, subd. (a)(30)(A), provides:

> "(a) A State plan for medical assistance **must** – (30)(A) **provide for** such methods and procedures relating to the utilization of, and **the payment for, care and services available under the plan** (including but not limited to utilization review plans as provided for in section 1396b(i)(4) of this title) **as may be necessary** to safeguard against unnecessary utilization of such care and services and **to assure that payments are consistent with** efficiency, economy, and **quality of care** and are **sufficient to enlist enough providers** so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area; . . . " (Emphasis supplied.)

[42 and 43 omitted in original.]

44. 42 U.S.C. § 1396a, subd. (a)(30)(A), shall hereinafter be referred to as "Sec. 30(A)."

45. However, in view of the fact that on January 10, 2008, the Governor proclaimed a fiscal emergency and called the Legislature into Special Session; and that on February 16, 2008 the Legislature enacted and the Governor signed into law Assembly Bill X3 5, which proclaims in Sec. 15 that "the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures," and which proclaims in Sections 16 and 17 that:

> "SEC. 16. This act *addresses the fiscal emergency declared by the Governor* by proclamation on January 10, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.
>
> SEC. 17 . . . In order to make statutory changes *needed to implement cost containment measures affecting health services, at the earliest possible time,* it is necessary that this act take effect immediately." (Emphasis supplied.)

it is manifest that the sole function and purpose, and the conclusive consideration in the Legislature's decision to enact subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, – which provides that the respondents shall (1) cut Medi-Cal payments to providers in the Medi-Cal fee-for-service program, was budgetary considerations, to "address the fiscal emergency" declared by the Governor, and to effect "cost containment measures affecting health services," by making statutory changes needed to reduce expenditures, (to fit the State's reduced budget), commencing July 1, 2008.

46. However, therein, by each and all of the above allegations, the enactment of subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, by the Legislature (1) was without any consideration of quality and access

as required by Sec. 30(A),[2] and as without any consideration of what it costs providers to perform the various services and procedures, as required by Sec. 30(A);[3] such that the State's sole purpose, and the conclusive factor, in enacting the across-the-board 10% reduction in reimbursement to providers in the Medi-Cal fee-for-service program, was to **reduce the budget deficit**. Accordingly, under the standard of *Orthopaedic Hosp.*, 103 F.3d 1491, at 1500 (1997); and *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir.1983), the action of the Legislature to enact the aforesaid subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, and the policy and action of the respondents to implement these statutes by reducing payments to providers in the Medi-Cal fee-for-service program, was and is arbitrary and capricious, and contrary to and in violation of the quality and access provisions of Sec. 30(A); so that hence, under the Supremacy Clause, the aforesaid subds. (a), (b)(1), (b)(2), and (c)-(e) of §14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code are preempted by Sec. 30(A)..

47. Accordingly, by each, and all of the foregoing facts alleged, subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf.

---

[2] *Othopaedic* [sic] *Hospital v. Belshe*, 103 F.3d 1491, 1500 (9th Cir.1997).

[3] *Id.*, 103 F.3d at 1500; *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993).

& Inst. Code., were and are unlawful, in violation of the quality and access provisions of Sec. 30(A), so as to be *preempted, under the Supremacy Clause, by the quality and access provisions* of Sec. 30(A), such that the respondent Director and the respondent Department act in excess of and without jurisdiction to implement subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, in implementing the provisions therein of reducing reimbursement to physicians, dentists, pharmacies, and other providers, in the Medi-Cal fee-for-service program, commencing July 1, 2008.

48. Further, unless restrained by the Court by an appropriate writ of mandamus under § 1085 Code Civ. Proc. or by an appropriate injunction, the respondents Director and Department will implement the aforesaid subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, and thereby will cause injury to each of the petitioners (except petitioner Jason Young, who is in a Medi-Cal managed care plan); which injury is irreparable, all, as has been hereinbefore set forth in detail in the within amended Petition, but, the petitioners have no administrative remedy, and the petitioners have no plain, speedy, or adequate remedy whatsoever or at all, except by this Verified First Amended Petition for Writ of Mandamus.

WHEREFORE, the Petitioners respectively pray for judgment as shall hereinafter be specified:

SECOND CAUSE OF ACTION

By petitioners Jason Young and the Tran Pharmacy, Inc., dba Tran Pharmacy, for mandamus and injunctive relief to enjoin each of the respondents to refrain from implementing the actuarial equivalent' of a 10% reduction of payments to Medi-Cal managed care plans under subd. (b)(3) of § 14105.19 Welf. & Inst. Code, which state statute and the action of respondents to implement the state statutes violate, and are hence preempted under the Supremacy Clause by, the quality and equal access clauses of 42 U.S.C. § 1396a(a)(30(A).

* * *

49. Petitioners refer to and incorporate each of the allegations in each of the preceding Paragraphs of this Petition, as if fully set forth herein; and, especially, refer to and incorporate each of the allegations in the First Cause of Action as if fully set forth herein.

50. The provisions of 42 U.S.C. § 1396a(a)(30)(A), – herein, "Sec. 30(A)" – apply to all managed care plans and managed care entities, who arrange to furnish or otherwise furnish Medi-Cal services to their members or beneficiaries, just as directly, fully, and equally as Sec. 30(A) applies to providers in the Medi-Cal fee-for-service program.

51. The provisions of Social Security Act § 1915(b)(4), (42 U.S.C. § 1396n(b)(4)), also specifically, by its terms, requires that the State of California set rates and payments for Medi-Cal managed care plans

and Medi-Cal managed care entities, upon the same standards as are set forth in Sec. 30(A).

52. Accordingly, – by each and all of the allegations in the preceding Paragraphs of this Petition, – and because Medi-Cal managed care plans and entities are agents of the State who, in effect, set the rates which shall be payable to providers for services to Medi-Cal recipients in Medi-Cal managed care plans, – the actions of the Legislature in enacting subd. (b)(3) of § 14105.19 Welf. & Inst. Code, to reduce payments to Medi-Cal managed care plans and entities by 10%, or the actuarial equivalent thereof, was arbitrary and capricious, and contrary to Sec. 30(A), and contrary to Social Security Act § 1915(b)(4), (42 U.S.C. § 1396n(b)(4); such that the policy of the respondents to implement, and the action of the respondents to implement subd. (b)(3) of § 14105.19 Welf. & Inst. Code, including the reduction of payments to Medi-Cal managed care plans and entities by 10%, or the actuarial equivalent thereof, managed care plans and entities, is thereby, under the Supremacy Clause, preempted by Sec. 30(A) and by Social Security Act § 1915(b)(4), (42 U.S.C. § 1396n(b)(4)), such that, unless the Court issues an appropriate writ of mandamus or injunction, the petitioner Jason Young and the petitioner Tran Pharmacy, Inc., dba Tran Pharmacy, (who are a managed care recipient and managed care provider), – will be irreparably injured, and put at risk of injury, in the same wise as has been prior alleged in the First Cause of Action, by the respondents reducing

payments, commencing July 1, 2008, to Medi-Cal managed care plans, in the actuarial equivalent of a 10% reduction in payment, which reduction will be passed through to providers who serve Medi-Cal managed care plan patients, causing fewer providers to participate in Medi-Cal managed care plans and injuring Medi-Cal managed care patients such as petitioner Josh Young, and forcing them or tending to force into institutions in order to survive..

WHEREFORE, the petitioners pray for judgment as shall hereinafter be specified:

THIRD CAUSE OF ACTION

(By all petitioners against each respondent.)

Preemption by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, ("ADA"), under the Supremacy Clause, of Sections 14, and 15 of Assembly Bill X3 5, for violation of the ADA, 42 U.S.C. § 12132, by forcing or threatening to force disabled persons into institutions, – such that such administration of the Medi-Cal program prevents, and does not provide, disabled persons with the most integrated setting appropriate to their needs, as mandated by the ADA and by *Olmstead v. L.C., 527 U.S. 581 (1999).*

53. Petitioners here refer to and incorporate each of the allegations in the preceding Paragraphs as if fully set forth herein.

54. By each and all of the foregoing facts alleged in Paragraphs 1 through 53 of this Petition, Sections 14, and 15 of Assembly Bill X3 5 are, singly and cumulatively, unlawful, in violation of the Americans with Disabilities Act of 1990, ("ADA"), 42 U.S.C. § 12132, which provides:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity(,"

in that the aforesaid 10% cut in Medi-Cal provider and hospital reimbursement of Sections 14 and 15 of Assembly Bill X3 5, will, singly, cumulatively, and proximately result in forcing, and threatening to force, thousands of persons who are qualified individuals with a disability, as defined in the ADA, into institutions, and place them at risk of being forced into institutions, in order to survive; and many will in any event be injured in their person and in their spirit and will die or be put at risk of dying; including but not limited to:

- the petitioners Margaret Dowling, Mark Beckwith, and Jason Young;
- hundreds of SSI recipients who are clients of the petitioner ILCSCal;
- many patients of the patients of the pharmacy petitioners,
- some members of the SF Gray Panthers and Sacto Gray Panthers,

so that therein, many qualified individuals with a disability, (as defined in the ADA), including but not limited to disabled SSI recipients who depend on Medi-Cal services to be able to live in the community, will be denied and will become unable to live in the **most integrated setting** appropriate to (1) the needs of those hundreds of thousands of Medi-Cal recipients who are SSI disabled persons, including (2) the needs of the disabled petitioners Margaret Dowling, Mark Beckwith, and Jason Young, and including (3) the needs of thousands of SSI disabled persons who are clients of the petitioner ILCSCal; and including (4) disabled patients of the pharmacy petitioners; **so that such administration of the Medi-Cal program does not provide qualified individuals with a disability the most integrated setting appropriate to their needs**, as mandated by the ADA, by *Olmstead v. L.C., supra,* 527 U.S. 581 (1999), and 28 Code of Federal Regulations, § 35.130(d). [1988].

55. Further, once the State has placed qualified individuals with a disability, (as defined by the ADA), in the community, including the petitioners Dowling, Beckwith, and Young, and the disabled persons listed in the preceding Paragraph; all, with medical, attendant, and other services and life-needed supplied furnished and paid by Medi-Cal fee-for-service and managed care program, or, assisted by these Medi-Cal programs of the State, so as to enable them to be so integrated into the community, the State has the burden, under the ADA, to justify and to show

reasonable grounds why such level, kinds, and quality of supporting services, assistance, and framework for independent living may be withdrawn by the State, as, in case at bar, by (1) provider payments for one month being arbitrarily and capriciously held for one month, and (2) provider and hospital payments being reduced 10%, permanently, by the State to Medi-Cal providers and Medi-Cal managed care plans, (which reductions to the managed care plans, will foreseeably and inevitably be passed through to the providers who provide the services of the Medi-Cal managed care plan to Medi-Cal recipients).

56. Therein and thereby, as set forth in the preceding Paragraphs of this Third Cause of Action, Secs. 14, and 15 of Assembly Bill X3 5 violate the ADA, and are preempted, under the Supremacy Clause, by the ADA specifically, by 42 U.S.C. § 12132, by forcing or threatening to force, individuals with a disability (as defined by the ADA), into institutions, and by putting them at risk to be forced into institutions, (including the petitioners Dowling, Beckwith, and Young, and the patients, clients, and members of the petitioner pharmacies, the ILCSCal, the Sacto Gray Panthers, and the SF Gray Panthers, – which is not the most integrated setting appropriate to their needs, as mandated by ADA and by *Olmstead v. L.C.*, *supra*, 527 U.S. 581.

Therein and thereby, the respondent Director and Department, by violating the ADA and of *Olmstead* on a statewide basis, are and will act in excess of

without jurisdiction to implement the aforesaid statutes (i.e., Secs. 14, and 15 of Assembly Bill X3 5).

57. Further, unless restrained by the Court by an appropriate writ of mandamus under § 1085 Code Civ. Proc. or by an appropriate injunction, the respondents Director and Department will implement the aforesaid Secs. 14, and 15 of Assembly Bill X3 5, and therein will cause each of the petitioners concrete injury, which is irreparable, as set forth in detail in the preceding Paragraphs of this Verified First Amended Petition for Writ of Mandamus; but, the petitioners have no administrative remedy, and no plain, speedy, or adequate remedy whatsoever or at all, except by this Verified First Amended Petition for Writ of Mandamus.

WHEREFORE, the Petitioners respectively pray for judgment as shall hereinafter be specified:

FOURTH CAUSE OF ACTION

Separate statement of violation of ADA

(By each petitioner against each respondent.)

58. Petitioners here refer to and incorporate each of the allegations in the preceding Paragraphs as if fully set forth herein.

59. Each and all of the acts of each of the respondents in violation of the ADA, which are set forth in the preceding Third Cause of Action, tend to force, do force, and threaten, to force qualified individuals

with a disability in the Medi-Cal program, – (including the petitioners Margaret Dowling, Mark Beckwith, and Jason Young, and the disabled patients, clients, and members of the remaining petitioners), – into institutions; all, in violation of the ADA (42 U.S.C. §12132) and *Olmstead, supra*. Accordingly, under the ADA, including 42 U.S.C. §§ 12123, and 12133, – which incorporates, via 29 U.S.C. § 794a(a)(2), the remedies of Title VI of the Civil Rights Act of 1964, (namely, 42 U.S.C. § 2000d-1 et seq.), – the petitioners herein have a federal right to an appropriate injunction herein to restrain the respondents from implementing Secs. 14, and 15 of Assembly Bill X3 5, plus, statutory reasonable attorneys's [sic] fees as provided by 42 U.S.C. § 12133.

WHEREFORE, the petitioners and each of them pray for judgment as follows;

1. That petitioners have judgment against each of the respondents, and that respondents take nothing.

First Cause of Action

2. That an alternative writ of mandamus, and then a peremptory writ of mandamus, and/or an injunction, be issued to command the respondents DEPARTMENT OF HEALTH CARE SERVICES ("Department") and SANDRA SHEWRY, Director of the Department, to set aside their preempted policy to implement subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, and to refrain from implementing the

aforesaid subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code, including refraining from reducing payments by 10%, or at all, to providers in the Medi-Cal fee-for service program;

3. That petitioners have reasonable attorneys' fees under § 1021.5 Code Civ. Proc.

Second Cause of Action

4. That an alternative writ of mandamus, and then a peremptory writ of mandamus, and/or an injunction, be issued to command the respondents DEPARTMENT OF HEALTH CARE SERVICES ("Department") and SANDRA SHEWRY, Director of the Department, to set aside their preempted policy to implement subd. (b)(3) of § 14105.19 Welf. & Inst. Code, and to refrain from implementing the aforesaid preempted subd. (b)(3) of § 14105.19 Welf. & Inst. Code, including refraining from reducing payments to Medi-Cal managed care plans by 10%, or by the actuarial equivalent thereof, and in any other amount of payment reduction.

5. That petitioners have reasonable attorneys' fees under § 1021.5 Code Civ. Proc.

Third Cause of Action

6. That a writ of mandamus or injunction be issued to order the respondents DEPARTMENT OF HEALTH CARE SERVICES ("Department") and

SANDRA SHEWRY, Director of the Department, to set aside their preempted policy of implementing Sections 14, and 15 of Assembly Bill X3 5, and refrain from implementing the aforesaid preempted Sections 14, ands [sic] 15 of Assembly Bill X3 5, in whole or in part; including, refraining from educing [sic] payments by 10% or any other amount of reduction, to Medi-Cal providers in the Medi-Cal fee-for-service program, and Medi-Cal managed care plans, for dates of service on and after July 1, 2008, or at any other time.

7. That petitioners have reasonable attorneys' fees under § 1021.5 Code of Civil Procedure.

Fourth Cause of Action

8. That an injunction be issued under the Americans with Disabilities Act of 1990, ("ADA"), to command the respondents DEPARTMENT OF HEALTH CARE SERVICES ("Department") and SANDRA SHEWRY, Director of the Department, to refrain from implementing Secs. 14, and 15 of Assembly Bill X3 5, in whole and in every part, including, refraining from implementing a 10% reduction, or any other reduction in payments, to Medi-Cal fee-for-services providers and Medi-Cal managed care plans.

9. That petitioners have reasonable attorneys' fees under 42 U.S.C. § 12133.

All Causes of Action

10. That petitioners have costs of suit incurred, together with such other and further relief as may be just.

Dated: May 12, 2008.

LYNN S. CARMAN
STANLEY L. FRIEDMAN

By: /s/ Lynn S Carman
Attorneys for Petitioners Independent Living Center of Southern California, Inc.; Gray Panthers of Sacramento; The Gray Panthers of San Francisco; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Tran Pharmacy, Inc., dba Tran Pharmacy; Margaret Dowling; Mark Beckwith; and Jason Young

---

VERIFICATION

LYNN S. CARMAN deposes and says:

I am the attorney for the Petitioners in the within Verified First Amended Petition for Writ of Mandamus. I make this verification for the reason that the Petitioners are absent from the county where I have my office. I have read the pleading and I am informed and believe the matters therein to be true

and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Novato, California, on May 12, 2008.

/s/ Lynn S Carman
LYNN S. CARMAN

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA
WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, et al., Petitioners, vs. SANDRA SHEWRY, Director of Department of Health Services of the State of California, et al. Respondents.	Case No. CV 08-3315 CAS (MANx) ORDER DENYING PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION (Filed Jun. 25, 2008)

I. INTRODUCTION

On April 22, 2008, petitioners filed a verified petition for writ of mandamus in the Los Angeles County Superior Court, seeking mandamus and injunctive relief against the California Department of Health Care Services ("the Department"), Sandra Shewry, Director of the Department ("the Director"), and Does 1 through 50.[1] The Department is a California agency

[1] Petitioners are the Independent Living Center of Southern California, Inc.; Gray Panthers of Sacramento; the Gray Panthers of San Francisco; Gerald Shapiro, Pham.D., [sic] d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; Tran Pharmacy, Inc., d/b/a Tran Pharmacy; and Jason Young.

charged with the administration of California's Medicaid program, Medi-Cal. Petitioners are health care advocates and Medi-Cal providers and recipients.

On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in special session. First Amended Petition ¶ 20. Section 14 of AB 5 adds Cal. Welf. & Inst. Code § 14105.19, which reduces by ten percent payments under the MediCal fee-for-service program for physicians, dentists, pharmacies, adult day health care centers, clinics, health systems, and other providers for services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14105.19(b)(1); First Amended Petition ¶ 22. California Welfare & Institutions Code § 14105.19 also reduces payments to managed care plans by the actuarial equivalent of the ten percent payment reduction. Cal. Welf. & Inst. § 14105.19(b)(3); First Amended Petition ¶ 22. Section 15 of AB 5 adds Cal. Welf. & Inst. Code § 14166.245, which reduces payments to acute care hospitals not under contract with the Department for inpatient services provided on or after July 1, 2008. Cal. Welf. & Inst. § 14166.245(c); First Amended Petition ¶ 23.[2] These rate and

---

[2] The Department is authorized to contract with individual hospitals for the exclusive right to treat Medi-Cal patients. Cal. Welf. & Inst. § 14081; *Cedars-Sinai Med. Ctr. v. Shewry*, 137 Cal. App. 4th 964, 969-70 (2006). Contracting hospitals are reimbursed by the Department at the negotiated contract rate, and, once the Department has contracted with enough hospitals to meet the needs of Medi-Cal beneficiaries in a geographic area, it awards no further contracts in that area. *Cedars-Sinai*, 137

(Continued on following page)

payment reductions are referred to herein as the "ten percent rate reduction."

Petitioners allege that the ten percent rate reduction violates Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* ("the Medicaid Act"), and therefore, may not be implemented. Petitioners seek declaratory relief and injunctive relief to restrain the implementation of the ten percent rate reduction.

On May 19, 2008, respondents removed this action to this Court, based on federal question jurisdiction. On May 28, 2008, petitioners filed the operative first amended petition against the Department and the Director. On June 1, 2008, petitioners voluntarily dismissed the Department as a respondent in this case without prejudice.

On May 30, 2008, petitioners filed the instant motion for preliminary injunction. Respondents filed their opposition thereto on June 12, 2008.[3] On June 16, 2008, petitioners filed a reply. A hearing was held on June 23, 2008, and the Court took this matter under submission. After carefully considering the parties' arguments, the Court denies petitioners' motion for the reasons set forth below.

Cal. App. 4th at 970. Noncontract hospitals are only reimbursed for treating Medi-Cal patients under certain circumstances, including where emergency care or services are provided. *Id.*

[3] By order dated June 19, 2008, the Court granted respondents' ex parte application to allow for the late filing of their instant opposition.

II. BACKGROUND

The Medicaid Act authorizes the federal government to distribute funds to participating states for the purpose of providing medical assistance to low income persons who are aged, blind, disabled, or members of families with dependent children. Medicaid is a cooperative federal program: the federal government provides federal funding to the states so that states may provide medical care to their needy citizens. State participation is voluntary; however, once a state chooses to participate by accepting federal funds, it must comply with requirements imposed by the Medicaid Act.

Because California has elected to participate in the Medicaid program, it must administer its state Medicaid program, known as Medi-Cal, in compliance with a state plan that has been pre-approved by the Secretary of the U.S. Department of Health and Human Services ("the Secretary"), and which complies with the requirements set forth in 42 U.S.C. § 1396a(a)(1)-(70). In accordance with these requirements, California must also provide methods and procedures for the payment of care and services that are consistent with efficiency, economy, and quality of care, and that ensure their availability to the Medicaid population to the same extent as they are available to the general population in the geographic area. 42 U.S.C. § 1396a(30)(A) ("§ (30)(A)").

Further, under California law, the Department must administer Medi-Cal in accordance with the

state plan; applicable state law, as specified in the Welfare and Institutions Code; and Medi-Cal regulations. Cal. Code Regs. tit. 22, § 50004(b).

Petitioners now move to preliminary enjoin the implementation of the ten percent rate reduction. The request for a preliminary injunction is predicated only on petitioners' first and second claims for relief.[4] In their first and second claims, petitioners allege the ten percent rate reduction violates 42 U.S.C. § 1396a(30)(A), which requires that a state plan must:

> provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and

---

[4] The first amended petition asserts four claims for relief. Petitioners' first claim is asserted by each of the petitioners except petitioner Jason Young. Petitioners' second claim is brought by petitioners Young and the Tran Pharmacy, Inc., d/b/a Tran Pharmacy. Petitioners third and fourth claims allege that §§ 14 and 15 of AB 5 are unenforceable because they are preempted by and violate the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12181 *et seq*. However, because petitioners' motion for preliminary injunction is predicated only on the first and second claims, and only on their Supremacy Clause theory raised in their motion papers, those are the only claims and argument that the Court addresses herein.

> services are available to the general population in the geographic area.

Petitioners allege that the Department and the Legislature improperly failed to consider efficiency, economy, and quality of care as required by § 30(A) in enacting the ten percent reduction, and that as a result of AB 5, there will not be a sufficient number of providers to provide equal access to healthcare as mandated by § 30(A).

III. LEGAL STANDARD

A preliminary injunction is appropriate when the moving party shows either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in the moving party's favor. *See Rodeo Collection, Ltd. v. West Seventh,* 812 F.2d 1215, 1217 (9th Cir. 1987). These are not two distinct tests, but rather "the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" *Id.* A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1421 (9th Cir. 1984).

IV. DISCUSSION

The "quality of care" provision of § (30)(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care.

42 U.S.C. § 1396a(30)(A). The "equal access" provision of § 30(A) provides that

> [a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are . . . sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

Id.

In *Sanchez v. Johnson,* 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit held that § 30(A) does not confer individual rights that are enforceable under 42 U.S.C. § 1983. *Id.* at 1060. There, plaintiffs,

consisting of a class of developmentally disabled individuals and several organizations, brought suit against California officials charged with the administration of programs for persons with developmental disabilities. *Id.* at 1053-54. The plaintiffs asserted claims under 42 U.S.C. § 1983, alleging that the defendants violated § 30(A) by failing to fund adequately community-based programs for persons with developmental disabilities. *Id.* at 1055. The district court found that in light of the Supreme Court's decision in *Gonzaga University v. Doe,* 536 U.S. 273 (2002), the Medicaid Act did not confer individual rights that were enforceable by recipients of Medicaid funding or providers of Medicaid services, under 42 U.S.C. § 1983.[5] *Id.* The district court therefore granted judgment on the pleadings in favor of the defendants. *Id.*

On appeal, the Ninth Circuit affirmed. The court reasoned that § 30(A) did not "focus[ ] on the rights of a specific class of beneficiaries." *id.* at 1059. The court found that instead, "§ 30(A) is concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." *Id.* at 1059-60. Because a plaintiff seeking to prosecute a claim under 42 U.S.C. § 1983 must "assert the violation of an individually enforceable *right* conferred specifically upon him, not merely a violation of

---

[5] In *Gonzaga,* the Supreme Court clarified the standard for determining whether a federal statute creates rights enforceable under 42 U.S.C. § 1983.

federal law," and because § 30(A) does not manifest a congressional intent to confer individual rights, the court found that the Medicaid Act did not give rise to rights enforceable under 42 U.S.C. § 1983. *Id.* at 1062 (emphasis in original).[6]

It is true, as petitioners argue, that in *Sanchez* the Ninth Circuit was presented with the question of whether individuals may invoke 42 U.S.C. § 1983 to sue for an alleged violation of § 30(A). However, in order to decide that issue the Ninth Circuit was first required to determine whether § 30(A) gives rise to any federally created individual rights: in evaluating "whether a statutory violation may be enforced through § 1983 . . . [a court] must first determine whether Congress *intended to create a federal right*. *Gonzaga,* 536 U.S. at 283 (emphasis in original). Thus, in deciding that the *Sanchez* plaintiffs could not enforce § 30(A) under 42 U.S.C. § 1983, the Ninth Circuit necessarily concluded that § 30(A) does not create any individual federal rights.

---

[6] The Court notes that there is a circuit split concerning whether plaintiffs can sue for alleged violations by state officials of § 30(A) under 42 U.S.C. § 1983. Specifically, the Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal [sic] have found that Medicaid beneficiaries cannot sue for alleged violations of § 30(A) under 42 U.S.C. § 1983. On the other hand, the Eighth Circuit has concluded that § 30(A) creates individual rights that can be the subject of suit under 42 U.S.C. § 1983. There is currently pending a petition for certiorari to the Supreme Court from the judgment in the Fifth Circuit case, *Equal Access for El Paso, Inc. v. Hawkins,* 509 F.3d 697 (5th Cir. 2007), *cert. pending* (U.S. Supreme Ct. No. 07-1160) (filed March 10, 2008).

Because after *Sanchez,* petitioners do not have any claims for relief under 42 U.S.C. § 1983 by which to seek redress for violations of § 30(A), petitioners seek to avail themselves of a claim for relief allegedly arising directly under the Supremacy Clause, Article VI, § 2, of the United States Constitution. However, the Supremacy Clause, of its own force, does not create any rights enforceable under 42 U.S.C. § 1983. *See Golden State Transit Corp. v. L.A.*, 493 U.S. 103, 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it [']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

In an attempt to avoid the effect of *Sanchez,* petitioners rely on cases following *Shaw v. Delta Air Lines,* 463 U.S. 85 (1983), to argue that AB 5 is preempted by the Medicaid Act, and therefore invalid under the Supremacy Clause, such that they are entitled to relief based on an implied right of action under the Supremacy Clause. In opposition, respondents argue that the Supremacy Clause does not confer any rights on petitioners. Respondents assert that petitioners therefore lack standing to maintain this suit.

In *Shaw,* the United States Supreme Court stated that

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.

> A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n.14; *see e.g., Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 641-43 (2002) (stating that the district court has federal question jurisdiction under 28. U.S.C. § 1331 in a suit where the plaintiff claimed that the Federal Communications Commission's order was preempted by federal law); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985) (stating that the Eighth Circuit erroneously concluded that a district court lacked subject matter jurisdiction where the affected plaintiff school district alleged that a South Dakota statute conflicted with federal law and was therefore invalid under the Supremacy Clause); *see also Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989).

Shaw preemption claims have been permitted in three circumstances. First, where the plaintiff claims that a state law requires him to act in violation of federal law.[7] Second, such claims have been allowed

---

[7] *See e.g., Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 258, 260-61 (1985) (after Lawrence

(Continued on following page)

where the plaintiff contends that his conduct will be restricted by a state law that is preempted by federal law.[8] Third, courts have entertained *Shaw*

County refused to distribute federal funds to the school district in accordance with a state statute, arguing that federal law gave it the discretion to spend the federal funds for any governmental purpose it chose, the school district filed suit seeking to compel Lawrence County to distribute the federal funds); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1005-07 (2d Cir. 1997) (suit by a public works contractor to enjoin the New York Department of Labor from enforcing a state wage law, alleging the state law was preempted by ERISA); *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 641-42 (2002) (Verizon sued the Maryland Public Service Commission alleging that the Federal Communications Commission's order requiring Verizon to make payments under a negotiated interconnection agreement violated the Telecommunications Act of 1996); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264 (10th Cir. 2004) (suit by telecommunications provider challenging local ordinance that imposed several requirements on telecommunications providers before they could access city-owned rights-of-way).

[8] *See e.g., City of L.A. v. County of Kern*, 509 F. Supp. 2d 865, 889 (C.D. Cal. 2007) (where the plaintiffs challenged a local ordinance on that grounds that it was preempted by state law, the court analogized the law of preemption under the California Constitution to that under the Supremacy Clause, and held that the plaintiffs had standing to bring suit because their "conduct would be restricted by a local ordinance they challenge[d] as preempted, even if the plaintiffs d[id] not assert rights protected by the preempting statute itself"); *Planned Parenthood of Cent. Tex. v. Sanchez*, 280 F. Supp. 2d 590, 596, 599-602 (W.D. Tex. 2003) (family planning and abortion services provider challenged state statute that precluded payment of Medicaid funds to organizations providing abortions services); *St. Thomas – St. John Hotel & Tourism Ass'n, Inc. v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 240-42 (3d Cir. 2000) (challenge to territorial law

(Continued on following page)

preemption claims where state law interferes with federally created rights.[9]

Here, AB 5 neither compels nor restricts petitioners' own conduct. In order to state a claim, petitioners must therefore show that AB 5 interferes with some individual federal right that arises under § 30(A). However, for the reasons stated *supra*, § (30)(A) does not give rise to a federally created right.[10]

---

providing that an employee discharged for any reason other than for cause as set forth in nine enumerated reasons will be considered to have been wrongfully discharged).

[9] *See e.g., League of Women Voters v. Blackwell,* 340 F. Supp. 2d 823, 827-28 (N.D. Ohio 2004) (challenge to Ohio Secretary of State's directive prescribing procedures for obtaining identification from first-time voters).

[10] Petitioners reliance on *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491 (9th Cir. 1997), decided before *Sanchez,* is misplaced. There, the plaintiff-providers filed suit under 42 U.S.C. § 1983, claiming that the Director violated § 30(A) by setting reimbursement rates for hospital providers of outpatient services without considering hospital costs. *Orthopaedic Hosp.,* 103 F.3d at 1492. In that case, however, there was no discussion of whether plaintiffs had any federally created individual rights. However, because *Sanchez* has decided that no individual right to sue is conferred by § 30(A), it appears that the holding of *Orthopaedic Hospital* is not controlling on that issue.

The cases addressed by petitioners at the hearing held herein are similarly unavailing. In *Ball v. Rodgers,* 492 F.3d 1094 (9th Cir. 2007), the court, noting that after *Sanchez,* § 30(A) cannot be enforced under 42 U.S.C. § 1983, analyzed different provisions of the Medicaid Act, which it determined, unlike § 30(A), gave rise to individual rights. In *Day v. Apoliona,* 496 F.3d 1027 (9th Cir. 2007), the Ninth Circuit applied the

(Continued on following page)

Because petitioners do not have any federal rights under § 30(A), their probability of success on the claims at issue here is low, if not wholly lacking.[11]

See Golden State Transit Corp. v. L.A., 493 U.S. *supra* at 108 (1989) ("'[The Supremacy] clause is not a source of any federal rights'; it [']secures federal rights by according them priority whenever they come in conflict with state law.'") (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

---

factors set forth in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to conclude that beneficiaries of a trust had individual rights that could be enforced under 42 U.S.C. § 1983. *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005), involved a challenge under the ADA.

[11] Petitioners' reliance on *Burgio & Campofelice, Inc. v. New York State DOL*, 107 F.3d 1000 (2d Cir. 1997) is also misplaced. In *Burgio & Campofelice, Inc.*, the plaintiff argued that the allegedly preempted state statute improperly caused the withholding of money that it was due under a public works contract. *Burgio & Campofelice, Inc.*, 107 F.3d at 1005-06. In *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), the First Circuit concluded that the plaintiff had standing to assert a claim under the Supremacy Clause reasoning that "[w]here a party has established a concrete injury in fact, and otherwise has standing to challenge the lawfulness of the statute, it is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should [its] constitutional challenge fail and the statute[] remain in force." *Id.* at 74 (internal quotations omitted; alterations in original). Here, § 30(A) does not give petitioners any right to Medi-Cal funds.

In light of the Court's finding that petitioners have no likelihood of succeeding on the merits, the Court, while acutely cognizant of the potential adverse consequences of the ten percent rate reduction, declines to address petitioners' arguments that they have shown irreparable harm. *See Global Horizons, Inc. v. United States DOL*, 510 F.3d 1054, 1058 (9th Cir. 2007) ("Once a court determines a complete lack of probability of success or serious questions going to the merits, its analysis may end, and no further findings are necessary.").

V. CONCLUSION

In accordance with the foregoing, the Court hereby DENIES petitioners' motion for preliminary injunction.

IT IS SO ORDERED.

Dated: June 25, 2008

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES
DISTRICT JUDGE

LYNN S. CARMAN, State Bar 028860
Medicaid Defense Fund
28 Newport Landing Dr.
Novato, CA 94949-8214
Telephone: (415) 927-4023
Facsimile: (415) 499-1687
Email: a7827@comcast.net

STANLEY L. FRIEDMAN, State Bar 120551
445 S. Figueora [sic] St., 27th Floor
Los Angeles, CA 90071-1631
Telephone: (213) 629-1500
Facsimile: (213) 489-6899
Email: friedman@friedmanlaw.org

Attorneys for
Plaintiffs Managed Pharmacy Care; Independent Living Center of Southern California, Inc.; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; and Tran Pharmacy, Inc., dba Tran Pharmacy

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MANAGED PHARMACY CARE, a California corporation; INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a California corporation; GERALD SHAPIRO, Pharm.D., doing business as Uptown Pharmacy & Gift Shoppe; SHARON STEEN, doing business as

No. CV09-0382 SJO PJWX

(Filed Jan. 16, 2009)

Central Pharmacy; and
TRAN PHARMACY, INC.,
a California corporation,

Plaintiffs,

-vs.-

DAVID MAXWELL-JOLLY,
Director of Department of
Health Care Services of the
State of California,

Defendant. /

The Plaintiffs complain of the defendant DAVID MAXWELL-JOLLY, Director of Department of Health Care Services of the State of California, and for claims for relief allege:

INTRODUCTION

1. Plaintiffs challenge the validity of the 5% reduction, under Assembly Bill ("AB") 1183, in reimbursement rates to providers of Pharmacy services to beneficiaries of the Medi-Cal fee-for-service program, for services furnished on or after March 1, 2009, which Defendant David Maxwell-Jolly, Director of the California Department of Health Care Services is responsible for implementing under AB 1183, and Welf. & Inst. Code 14105.

Jurisdiction and venue

2. The Court has jurisdiction under 28 U.S.C. § 1331. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.4 (1983).

3. The actions of the Defendant complained were and will be done in all parts of the state of California, including the County of Los Angeles. The injuries which are inflicted and threatened which are complained of, to Plaintiffs, the members of Managed Care Pharmacy, and their patients in the Medi-Cal fee-for-service program, have occurred and are threatened to occur in all parts of the state of California, including the County of Los Angeles. The Defendant and the California Attorney General has an office in the County of Los Angeles.

Parties

4. The plaintiff MANAGED PHARMACY CARE ("MPC") is a California corporation, whose principal place of business is at Lake Arrowhead, California, and does business throughout California, including the County of Los Angeles, California. MPC has 284 pharmacy members throughout California, who are pharmacy providers in the Medi-Cal fee-for-service program.

5. (a) The plaintiff INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC. ("ILCSCal") is a nonprofit California corporation which was duly organized and incorporated in California on

July 25, 1977 pursuant to the General Nonprofit Corporation Law of the State of California.

(b) ILCSCal has its principal office and place of business in, and does business in the County of Los Angeles, California.

6. (a) The plaintiff GERALD SHAPIRO, Pharm.D., is a duly licensed registered pharmacist with License No. 24377, who owns and operates a duly licensed retail pharmacy under the fictitious name of Uptown Pharmacy & Gift Shoppe, under retail pharmacy license No. PHY 41615, in the City of Los Angeles, California.

(b) The plaintiff SHAPIRO's pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans, under Medi-Cal provider identification No. PHA 416150.

7. (a) The plaintiff SHARON STEEN is an individual who is a copartner in a copartnership which owns and operates a licensed retail pharmacy, under the fictitious name Central Pharmacy, under retail pharmacy license No. PHY 38051, in the City of Santa Monica, California.

(b) The plaintiff STEEN's pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans, under Medi-Cal provider identification No. PHA 380510.

8. (a) The Plaintiff TRAN PHARMACY, INC. is California corporation which owns and operates a duly licensed retail pharmacy under the fictitious

name of Tran Pharmacy, under retail pharmacy license No. PHY 43647, in Garden Grove, California.

(b) The TRAN PHARMACY, INC.'s pharmacy participates in the Medi-Cal fee-for-service program and also in Medi-Cal managed care plans, under Medi-Cal provider identification No. PHA 436470.

9. (a) The Department of Health Care Services ("Department") is a department of the State of California. The Department administers the Medi-Cal program under § 14000 et seq. California Welfare and Institutions ("Welf. & Inst.") Code.

(b) The defendant DAVID MAXWELL-JOLLY, ("Director"), is the director of the Department. The Director is exclusively empowered by §§ 14100.1 and 14105 Welf. & Inst. Code to set all policies, rules and regulations in the Medi-Cal program, including all rates payable to Medi-Cal providers. The Director has an office in the County of Los Angeles. The Director is sued in his official capacity, only.

10. Plaintiffs are citizens and residents of the State of California, and sue herein on their own behalf, in their own interest, and in the interest of the members of MPC, and in the interests of the Medi-Cal patients of the Plaintiffs and the members of MPC, as well as also on behalf of the public of the State of California, to procure the performance of public duty by the defendant public official: namely the performance of the mandatory public duty of the Director, under and pursuant to the Supremacy

Clause, not to injure Medi-Cal beneficiaries and their providers, including Pharmacy providers, in the Medi-Cal FFS program, by implementing the federally preempted 5% Rate Reduction of AB 1183, – which aforesaid actions of the Director are preempted, under the Supremacy Clause, in that the aforesaid actions violate and are hence contrary to 42 U.S.C. § 1396a(a)(30)(A), – "Sec. 30A," – including the quality and equal access clauses of Sec. 30A.

11. Plaintiffs also sue in a prudential *jus tertii* capacity to assert their interests as well as the interests of the Medi-Cal patients of the Plaintiffs and the members of MPC, in the claims for relief, and Supremacy Clause preemption, which are sued upon and sought in this within intervention complaint.

12. Plaintiffs, – as well as the Pharmacy provider members of MPC, – and their Medi-Cal patients on behalf of whom Plaintiffs sue herein, – also have standing and a claim for relief against the Director inasmuch as each has suffered, will suffer, and is threatened to suffer, concrete and irreparable injury, unless the Defendant Director is restrained by an appropriate injunction from implementing the 5% Rate Reduction of AB 1183, which actions are preempted under the Supremacy Clause by Sec. 30A.

INTRODUCTION

13. Medi-Cal is a major component of the "safety net" that ensures the State's poor have access to health care services.

FIRST CLAIM FOR RELIEF

For injunctive relief to enjoin the Defendant to refrain from implementing AB 1183 and the 5% Rate Reduction

14. Plaintiffs refer to and incorporate each of the allegations in the preceding Paragraphs of this Complaint as if fully set forth herein.

LEGISLATIVE HISTORY OF ASSEMBLY BILL 1183

15. Assembly Bill ("AB") 1183, – a health trailer bill to implement the budget cutting decisions of the 2008-2009 Budget Bill, was enacted September 30, 2008 and was chaptered as Chapter 758, Statutes 2008-2009.

AB 1183

16. AB 1183 was introduced Feb. 2, 2008 as a hazardous material bill and was amended several times as solely a hazardous material bill. However, on September 15, 2008, the bill was amended in the Senate so as to be at once turned into a trailer bill, on many different subjects, to enact all provisions necessary to implement the provisions of the 2008-2009 Budget Bill; all without any public hearings or any hearing by any committee of the Legislature; was passed shortly before midnight of the same day of September 15, 2008 by the Senate; was sent to the Assembly, and was immediately passed by the

Assembly before 2:08 a.m. of September 16, 2008, – all within the space of a few hours, – and was signed by the Governor and filed with the Secretary of State on September 30, 2008.

17. By such legislative history, there were no committee hearings on AB 1183.

18. Further, there are hundreds of different health care subjects in AB 1183, each of which required separate consideration by the Legislature if any reasoned decision was to be made by any legislator in the Senate or the Assembly in deciding to vote for, or against particular provisions in the hundreds of different subjects contained in the bill. AB 1183 was hence the pure product of pure logrolling, where, if any member wished his or her health care provision in the multi-provisioned AB 1183 to be enacted, that legislator had to accept blindly all the other provisions relating to the hundreds of other subjects in the same bill.

19. It is a fact, and it is manifest from all the facts alleged in this First Claim for Relief, that individual legislators who voted on AB 1183, and the Legislature as a whole, could not and did not appropriately consider, and did not consider at all, whether or not the reduced rates of the 5% Rate Reduction for pharmacy services, and the reduced rates of the 5% Rate Reduction, were consistent with quality of services, or consistent with equal access of beneficiaries to quality services, in the Medi-Cal FFS program.

20. By each and all of the above facts, the action of the Legislature in enacting, and the action of the Director to implement, the 5% Rate Reduction provisions of AB 1183 were and are arbitrary, capricious, and contrary to law, (namely, contrary to the quality and equal clauses of Sec. 30A, and contrary to the requirement of Sec. 30A that a Medicaid rate setter consider the factors of quality and equal access of beneficiaries in the course of setting new Medicaid rates for payment of providers); so that the provisions of (new) Welf. & Inst. Code § 14105.191 which enacted the 5% Rate Reduction in respect to Pharmacy services, effective March 1, 2009, violated and hence are preempted, under the Supremacy Clause, by Sec. 30A.

21. Further, unless restrained by the Court by an appropriate injunction, the defendant Director will implement the aforesaid 5% Rate Reduction in respect to Pharmacy services providers (including members of MPC); which in turn will thereby result in injury to the Plaintiffs; to the members of MPC; and to their Medi-Cal patients – which injury will foreseeably result in Pharmacy providers (including members of MPC) not accepting new Medi-Cal patients, or stopping serving Medi-Cal patients at all, or by reducing kinds, amounts, locations, and levels of services to Medi-Cal beneficiaries, or by going out of business, so that thereby Medi-Cal beneficiaries are and will be caused, and threatened to be caused, denial and reduction of access to life-vital Pharmacy services and treatment in the Medi-Cal FFS program,

resulting in great physical suffering and injury to beneficiaries, including beneficiaries who are patients of Plaintiffs and of the members of MPC; all to the irreparable injury, and threat of irreparable injury, to thousands of Medi-Cal beneficiaries including the beneficiaries served by Plaintiffs and the members of MPC.

22. Plaintiffs and the members of MPC,. and their Medi-Cal patients, have no administrative remedy, nor any plain, speedy, or adequate remedy whatsoever or at all, except by this complaint in intervention for injunctive relief.

WHEREFORE, Plaintiffs pray for judgment and orders as shall hereinafter be specified:

SECOND CLAIM FOR RELIEF

For injunctive relief to enjoin the Defendant to refrain from implementing the 5% Rate Reduction of Sec. 45 of AB 1183.

23. Plaintiffs refer to and incorporate each of the allegations in the preceding Paragraphs of this Petition as if fully set forth herein.

24. However, the enactment of the 5% Rate Reduction in respect to Pharmacy services and providers in the Medi-Cal HS program, of new Welf. & Inst. Code § 14105.191, by Sec. 45 of AB 1183, by the Legislature was without any consideration of quality

and equal access as required by Sec. 30A,[1] and was without any consideration of what it costs providers to perform the various services and procedures, as required by Sec. 30A;[2] such, that the State's sole purpose, and the conclusive factor, in enacting the 5% Rate Reduction was to reduce the budget deficit.

25. Accordingly, under the standard of *Orthopaedic Hosp.*, 103 F.3d 1491, at 1500 (1997), the action of the Legislature to enact the aforesaid provisions of § 14105.191 Welf. & Inst. Code, including the 5% Rate Reduction in respect to Pharmacy providers; and the policy and action of the Director to implement the 5% Rate Reduction, was and is arbitrary and capricious, and contrary to and in violation of the quality and access provisions of Sec. 30A.

26. Accordingly, by each and all of the foregoing facts alleged, new § 14105.191 Welf. & Inst. Code, and the 5% Rate Reduction in respect to Pharmacy providers, were and are contrary to and in violation of the quality and access provisions of Sec. 30A, so as to be preempted, under the Supremacy Clause, by the quality and access provisions of Sec. 30A, such that the Defendant Director is and will he acting in excess of and without jurisdiction to implement § 14105.191

---

[1] *Othopaedic* [sic] *Hospital v. Belshe*, 103 F.3d 1491, 1500 (9th Cir.1997).

[2] *Id.*, 103 F.3d at 1500; *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993).

Welf. & Inst. Code, including the 5% Rate Reduction, to Pharmacy providers, commencing March 1, 2009.

27. Further, unless restrained by the Court by an appropriate injunction, the Defendant Director will implement the aforesaid § 14105.191 Welf. & Inst. Code, and the 5% Rate Reduction in payments to Pharmacy providers, commencing March 1, 2009, and thereby will cause injury to Plaintiffs; the members of MPC, and their Medi-Cal patients; which injury is irreparable, all, as has been hereinbefore set forth in detail in the within complaint in intervention.

28. Plaintiffs, the members of MPC, and their Medi-Cal patients, have no administrative remedy, nor any plain, speedy, or adequate remedy whatsoever or at all, except by this complaint in intervention for injunctive and declaratory relief.

WHEREFORE, Plaintiffs prays for judgment and orders as follows:

A. That Plaintiffs have judgment against the Defendant DAVID MAXWELL-JOLLY, Director of California Department of Health Services, (herein, "Director"), and that Defendants take nothing.

B. That a preliminary and permanent injunction be issued to command the Director DAVID MAXWELL-JOLLY to set aside his preempted policy to implement § 14105.19 Welf. & Inst. Code, of AB 1183, and the 5% Rate Reduction, and, to refrain from implementing the same; including but not limited to refraining from reducing payments by 5 percent or by

any other deduction, to pharmacy providers in the Medi-Cal FFS program, for services furnished on and after March 1, 2009.

C. That Plaintiffs have costs of suit incurred, together with such other and further relief as may be just.

LYNN S. CARMAN
STANLEY L. FRIEDMAN

By: /s/ Stanley L. Freidman
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SANTA ROSA MEMORIAL HOSPITAL, et al., Plaintiffs, v. DAVID MAXWELL-JOLLY, Director the California Department of Health Care Services, Defendant.	Case No. 08-5173 SC ORDER DENYING APPLICATION FOR AN ORDER TO SHOW CAUSE; CLARIFYING PRELIMINARY INJUNCTION (Filed Dec. 10, 2009)

On December 8, 2009, Plaintiffs applied for an Order to Show Cause as to why David Maxwell-Jolly, Director of the California Department of Health Care Services ("DHCS"), should not be held in contempt for violating this Court's injunction of Medi-Cal reimbursement rate reductions. Docket No. 81 ("Application for OSC"). On December 9, 2009, Defendant filed an Opposition. Docket No. 82 ("Opp'n"). Having considered the papers submitted, the Court acknowledges that the text of its preliminary injunction is open to interpretation, and the Court therefore DENIES Plaintiffs' request for an order to show cause why the DHCS should not be held in contempt.

On November 18, 2009, the Court determined – based on binding Ninth Circuit precedent – that the Medi-Cal reimbursement rate reductions at issue violate federal law. Docket No. 68 ("Prelim. Inj.

Order"). Based on language submitted by Plaintiffs, the Court preliminarily enjoined the DHCS from continuing to implement and apply the ten percent reduction in the "allowable cost" reimbursement of the Plaintiffs for the inpatient services they provide to Medi-Cal patients. *Id.* at 14.

In response to the Order, the DHCS updated its website as follows:

> Pursuant to the November 18 order, when DHCS issues audited cost settlements for the plaintiff hospitals in *Santa Rosa,* it shall compensate them at 100 percent of their audited allowable costs for dates of service on or after November 18, 2009. The court's order does not affect interim payments to the plaintiff hospitals under Welfare and Institutions Code section 141666.245(b)(3).

Docket No. 81-1 ("Johnson Decl.") Ex. 1. Plaintiffs contend that the DHCS is violating the injunction by continuing to reduce its interim payments to Plaintiffs. Application for OSC at 2.

The Court now clarifies that its preliminary injunction was always intended to enjoin the ten percent reductions in both interim and final payments. In the Order, the Court quotes from both California Welfare & Institutions Code Section 14166.245(b)(1) regarding interim reimbursements, and Section 14166.245(c)(3) regarding final reimbursements. Order at 2. Throughout the Order, the

Court refers to the Medi-Cal reimbursement rate *reductions*. *See* Order at 2, 4, 6, 8, 9, 11.

For the sake of clarity, the Court MODIFIES the text of its preliminary injunction as follows:

It is hereby ORDERED that, as of November 18, 2009, Defendant Maxwell-Jolly, Director of the California Department of Health Care Services, is preliminarily enjoined from continuing to implement and apply to Plaintiffs the ten percent reduction in interim payments in California Welfare & Institutions Code Section 14166.245(b)(1), and the ten percent reduction in audited allowable costs in California Welfare & Institutions Code Section 14166.245(c)(3).

IT IS SO ORDERED.

Dated: December 10, 2009

/s/ Samuel Conti
UNITED STATES
DISTRICT JUDGE

RD
ND
BRIEFS

Nos. 09-958, 09-1158, and 10-283

Supreme Court, U.S.
FILED
MAY 19 2011
OFFICE OF THE CLERK

In the

Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
*Counsel of Record
SUSAN M. CARSON
JENNIFER M. KIM
Supervising Deputy Attorneys General

GREGORY D. BROWN
CARMEN SNUGGS
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email: Karin.Schwartz@doj.ca.gov
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036-3306
(202) 326-6010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTION PRESENTED

Under the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), concluded that this provision is not privately enforceable by providers or beneficiaries under 42 U.S.C. § 1983, *inter alia*, because it does not confer any "rights" on providers or beneficiaries, and because it requires balancing of indeterminate and potentially conflicting policy objectives that are "ill-suited" for judicial enforcement. Nonetheless, the Ninth Circuit held that such considerations were irrelevant in the present cases, where respondents are proceeding under the Supremacy Clause rather than under § 1983.

The question presented is:

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 30(A) by asserting that the provision preempts a state law that may reduce payments to providers?

LIST OF PARTIES

No. 09-958 (*Indep. Living*)

Petitioner is Toby Douglas (formerly David Maxwell-Jolly), Director of the Department of Health Care Services, State of California (DHCS).

Respondents who were plaintiffs-appellees below are Independent Living Center of Southern California, Inc., a nonprofit corporation; Gray Panthers of Sacramento, a nonprofit corporation; The Gray Panthers of San Francisco, a nonprofit corporation; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; and Tran Pharmacy, Inc., a corporation d/b/a Tran Pharmacy.

Respondents who were intervenor-appellees below are Sacramento Family Medical Clinics, Inc.; Theodore M. Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services.

No. 09-1158 (*Cal. Pharm.*)

Petitioners are Toby Douglas (formerly David Maxwell-Jolly), Director of DHCS; William Lightbourne (formerly John A. Wagner), Director of the Department of Social Services, State of California; and Edmund G. Brown Jr. (formerly Arnold Schwarzenegger), Governor of the State of California.

California Pharmacists respondents are California Hospital Association; Sharp Memorial Hospital; Grossmont Hospital Corporation; Sharp Chula Vista

LIST OF PARTIES – Continued

Medical Center; Sharp Coronado Hospital and Healthcare Center; Acacia Adult Day Services; California Association for Adult Day Services; Fe Garcia; and Charles Gallagher.[1]

Independent Living respondents are Independent Living Center of Southern California, Inc., a nonprofit corporation; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; and Tran Pharmacy, Inc., d/b/a Tran Pharmacy.

Dominguez respondents are Lydia Dominguez (now deceased); Patsy Miller; Alex Brown, by and through his mother and next friend Lisa Brown; Donna Brown; Chloe Lipton, by and through her conservator and next friend Julie Weissman-Steinbaugh; Herbert M. Meyer; Leslie Gordon; Charlene Ayers; Willie Beatrice Sheppard; Andy Martinez; Service Employees International Union United Healthcare Workers West; Service Employees International Union United Long-Term Care Workers; Service Employees International Union Local 521;

---

[1] The petition named an additional six respondents: the California Pharmacists Association, California Medical Association, California Dental Association, Marin Apothecary, Inc. d/b/a Ross Valley Pharmacy, South Sacramento Pharmacy, and Farmacia Remedios, Inc. Those entities were plaintiffs in the district court, but were not parties in the court of appeals, and thus are not respondents under this Court's Rule 12.6.

LIST OF PARTIES – Continued

and Service Employees International Union California State Council.

No. 10-283 (*Santa Rosa*)

Petitioner is Toby Douglas (formerly David Maxwell-Jolly), Director of DHCS.

Respondents are Santa Rosa Memorial Hospital; St. Helena Hospital; Queen of the Valley Medical Center; Central Valley General Hospital; San Joaquin Community Hospital; San Antonio Community Hospital; Children's Hospital at Mission; Saddleback Memorial Medical Center; Orange Coast Memorial Medical Center; Anaheim Memorial Medical Center; Hoag Memorial Hospital Presbyterian; Heart Hospital of BK, LLC; John Muir Health; SRM Alliance Hospital Services; Lancaster Hospital Corporation; Fountain Valley Regional Hospital and Medical Center; and Mission Hospital Regional Medical Center.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory and regulatory provisions involved	2
Statement of the case	5
A. Statutory and regulatory background	6
B. Facts	9
C. Proceedings below	10
Summary of argument	14
Argument	20
I. Private parties cannot enforce § 30(A) because Congress has not created a private cause of action to enforce this federal statute	20
A. Only Congress can create a private cause of action to enforce a federal statute	20
B. Section 30(A) does not create a private cause of action	23
C. Implying a cause of action would contravene congressional intent	26
II. The Supremacy Clause does not provide a mechanism for circumventing *Gonzaga*, *Sandoval*, and *Cort*	33
A. The Supremacy Clause provides a rule of decision rather than a cause of action	35

TABLE OF CONTENTS – Continued

Page

B. Cases involving Spending Clause legislation are particularly inappropriate for the Supremacy Clause 46

C. Respondents cannot overcome prudential standing limitations to assert any claims they may have 49

Conclusion..... 54

TABLE OF AUTHORITIES

Page

CASES

Abbeville General Hosp. v. Ramsey, 3 F.3d 797 (5th Cir. 1993) 31

Alexander v. Sandoval, 532 U.S. 275 (2001) .....*passim*

Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006) 42

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006).....46

Astra USA, Inc. v. Santa Clara County, 131 S. Ct. 1342 (2011).....*passim*

Bates v. Dow Agrosciences, 544 U.S. 431 (2005).....43

Beeker v. Olszewski, 415 F. Supp. 2d 734 (E.D. Mich. 2006).....47

Bennett v. Spear, 520 U.S. 154 (1997) 8, 51

Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408 (2008).....43

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).....17, 35, 36

Cort v. Ash, 422 U.S. 66 (1975) .....*passim*

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).....43

Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710 (2009).....43, 44

Davis v. Passman, 442 U.S. 228 (1979) 21, 22

TABLE OF AUTHORITIES – Continued

Page

Dennis v. Higgins, 498 U.S. 439 (1991) 17, 35

Doe v. Kidd, 501 F.3d 348 (4th Cir. 2007), *cert. denied*, 522 U.S. 1243 (2008).....46

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2007).....49

Engine Mfrs. Ass'n v. S. Coast Air Quality, 541 U.S. 246 (2004).....43, 44

Equal Access for El Paso, Inc. v. Hawkins, 509 F.3d 697 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 34 (2008).....24

Erie Cty. Geriatric Ctr. v. Sullivan, 952 F.2d 71 (3d Cir. 1991).....31

Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 27

Ex parte Young, 209 U.S. 123 (1908).....41

Gibbons v. Ogden, 9 Wheat. 1 (1824).....42, 48

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989).....17, 35, 42, 44

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) .....*passim*

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006).....46

Horne v. Flores, 129 S. Ct. 2579 (2009) 21

Ill. Health Care Ass'n v. Bradley, 983 F.2d 1460 (7th Cir. 1993) 31

TABLE OF AUTHORITIES – Continued

Page

Independent Living Center of Southern California v. Shewry, 543 F.3d 1050 (9th Cir. 2008) ..... *passim*

Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs., 31 F.3d 1536 (10th Cir. 1994) 32

Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) 24, 26

Mandy R. ex rel. Mr. & Mrs. R. v. Owens, 464 F.3d 1139 (10th Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007) 24

Meachem v. Wing, 77 F. Supp. 2d 431 (S.D.N.Y. 1999) 47

Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 27

Minn. HomeCare Ass'n v. Gomez, 108 F.3d 917 (8th Cir. 1997) 27

Minn. Pharmacists Ass'n v. Pawlenty, No. 09-2723, 2010 U.S. Dist. LEXIS 11620 (D. Minn. Feb. 10, 2010) 24

N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono, 444 F.3d 147 (2d Cir. 2006) 24

N.Y. v. United States, 505 U.S. 144 (1992) 18, 46

Pa. Pharmacists Ass'n v. Houstoun, 283 F.3d 531 (3d Cir. 2002) 24, 27

TABLE OF AUTHORITIES – Continued

Page

Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005 (8th Cir. 2006), *cert. granted, judgment vacated in part*, 551 U.S. 1142 (2007) 24

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 18, 21, 28, 46, 48

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 12

Pinnacle Nursing Home v. Axelrod, 928 F.2d 1306 (2d Cir. 1991) 31

Rite Aid of Pa., Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) 27

Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008) 43

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004) 47

Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) ..... *passim*

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 28, 52

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 12, 42, 43

Singleton v. Wulff, 428 U.S. 106 (1976) 51

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008) 15, 21

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 35, 36

TABLE OF AUTHORITIES – Continued

Page

Temple Univ. v. White, 941 F.2d 201 (3d Cir. 1991) 31

Va. Office for Protection & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) 41, 44

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) 19, 20, 49, 51, 52

Verizon Md., Inc. v. Public Serv. Comm'n, 535 U.S. 635 (2002) 44

Warth v. Seldin, 422 U.S. 490 (1975) 19, 49, 50, 51, 52

Watson v. Weeks, 436 F.3d 1152 (9th Cir. 2006) 47

Watters v. Wachovia, 550 U.S. 1 (2007) 43, 44

Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006) 24

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) ..... *passim*

Wilderness Soc'y v. Kane County, 581 F.3d 1198 (2009), *on reh'g en banc*, 632 F.3d 1162 (10th Cir. 2011) 36, 44, 51

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 26

STATUTES AND REGULATIONS

5 U.S.C. § 704 8

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1396 6

42 U.S.C. § 1396a 6

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396a(a)(3) 47
42 U.S.C. § 1396a(a)(10) 47
42 U.S.C. § 1396a(a)(23) 46, 47
42 U.S.C. § 1396a(a)(30)(A) ..... *passim*
42 U.S.C. § 1396c ..... *passim*
42 U.S.C. § 1396d(r)(5) 47
42 U.S.C. § 1396p 42
42 U.S.C. § 1983 ..... *passim*
42 C.F.R. § 430.12 7
42 C.F.R. § 430.33(c)(3) 7, 47
42 C.F.R. § 430.35 ..... 7, 18, 47
42 C.F.R. § 430.35(d) 7, 47
42 C.F.R. § 430.38 8
42 C.F.R. § 430.42(a) 7, 47
42 C.F.R. § 430.42(d) 7, 47
42 C.F.R. § 430.48 ..... 7, 47
42 C.F.R. § 430.60 7
42 C.F.R. § 430.76 ..... 8, 29
42 C.F.R. § 430.83 ..... 8, 29
42 C.F.R. § 430.86 ..... 8, 29
42 C.F.R. § 430.88 ..... 8, 29
42 C.F.R. § 430.102 8
Cal. Welf. & Inst. Code § 12306.1(d)(6) 4, 9

TABLE OF AUTHORITIES – Continued

Page

Cal. Welf. & Inst. Code § 14105.19(b)(1).....4, 9
Cal. Welf. & Inst. Code § 14105.191 10
Cal. Welf. & Inst. Code § 14105.191(b)(1).....9
Cal. Welf. & Inst. Code § 14105.191(b)(2).....9
Cal. Welf. & Inst. Code § 14105.191(b)(2)(B).....4
Cal. Welf. & Inst. Code § 14105.191(b)(2)(D) 4
Cal. Welf. & Inst. Code § 14105.191(b)(2)(E).....4
Cal. Welf. & Inst. Code § 14105.191(b)(2)(F).....4
Cal. Welf. & Inst. Code § 14105.191(b)(3).....4, 9
Cal. Welf. & Inst. Code § 14105.191(j).....10
Cal. Welf. & Inst. Code § 14105.192 10
Cal. Welf. & Inst. Code § 14166.245(b).....4, 9
Cal. Welf. & Inst. Code § 14166.245(b)(2)(A).....4
Cal. Welf. & Inst. Code § 14166.245(c) 9
Cal. Welf. & Inst. Code § 14166.245(c)(3).....4, 9
Cal. Welf. & Inst. Code § 14166.245(c)(3)(B).....4
Cal. Welf. & Inst. Code § 14166.245(j) 10

CONSTITUTIONAL PROVISIONS

Commerce Clause, U.S. Const., art. I, § 8, cl. 3.....35
Necessary and Proper Clause, U.S. Const., art. I, § 8, cl. 18 39
Spending Clause, U.S. Const., art. I, § 8, cl. 1 .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Supremacy Clause, U.S. Const., art. VI, cl. 2 .....*passim*

U.S. Const., amend. XI 41

U.S. Const., art. I, § 8 40

U.S. Const., art. III 50

U.S. Const., art. VI 17, 39, 40

OTHER AUTHORITIES

3 Joseph Story, *Commentaries on the Constitution of the United States* (Fred B. Rothman & Co. 1991) (1833) 40, 49

142 Cong. Rec. S5355 (1996) 33

143 Cong. Rec. S6058 (1997) 33

143 Cong. Rec. S6301-02 (1997) 32, 33

AARP's Application for Leave to File *Amicus Curiae* Brief and Proposed *Amicus Curiae* Brief Urging Affirmance of CMS' Decision Disapproving Proposed California State Plan Amendments, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Feb. 3, 2011) 8

Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997).....29, 31, 32

Caleb Nelson, *Preemption* Va. L. Rev. 225 (2000) 36

Christopher R. Drahozal, *The Supremacy Clause* (2004) 37, 39

TABLE OF AUTHORITIES – Continued

Page

Email from Benjamin R. Cohen, Presiding Officer, to David Hoskins *et al.*, Re: Petitions to Participate in Hearing on Reconsideration of California State Plan Amendments (Feb. 10, 2011) 8

H.R. Rep. No. 97-158, Pt. 2 (1981) 30

H.R. Rep. No. 101-247 (1989) 30, 31

H.R. Rep. No. 105-149 (1997) 32, 33

James Madison, Vices of the Political System of the United States (1787), *in* 2 *The Writings of James Madison* (G. Hunt ed., 1901) 18, 37, 38

John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008) 44

Joint Petition for Participation in Administrative Hearing, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Jan. 3, 2011) 8

Letter from James Madison to N. P. Trist (Dec. 1831), *in* 3 *The Records of the Federal Convention of 1787* (Farrand ed., 1937) 38

Letter from Mary Staples, Regional Director, State Government Affairs, National Association of Chain Drug Stores, to Benjamin Cohen, Presiding Officer, Centers for Medicare and Medicaid Services (Jan. 5, 2011) 8

TABLE OF AUTHORITIES – Continued

Page

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2174, 95 Stat. 809 (1981).....30

Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260 (1989).....30

Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 962(a), 94 Stat. 2599 (1980).....31

Records of the Federal Convention, *in* 4 *The Founders' Constitution* (Kurland ed., 1987).....37, 38, 39

S. Rep. No. 90-744 (1967).....30

Social Security Amendments of 1967, Pub. L. No. 90-248, § 237(b), 81 Stat. 821, 911 (1968).....30

Social Security Amendments of 1972, Pub. L. No. 92-603, § 237(a)(2), 86 Stat. 1329, 1416 (1972).....30

The Federalist No. 22 (Alexander Hamilton).....37

The Federalist No. 33 (Alexander Hamilton).....18, 40, 49

The Federalist No. 42 (James Madison).....37

The Federalist No. 78 (Alexander Hamilton).....18, 38, 39

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 80 (Alexander Hamilton) 39

Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085 (2000) 36, 41

OPINIONS BELOW

No. 09-958 (*Indep. Living*). This petition seeks review of two opinions of the Ninth Circuit Court of Appeals, one reported at 572 F.3d 644, *Indep. Living* Pet. App. 1, and one not reported, *id.* at 54. A prior Ninth Circuit opinion in the case is reported at 543 F.3d 1050, *Indep. Living* Pet. App. 58. The district court opinions that led to the Ninth Circuit decisions, *id.* at 94, 125, 127, 133, are unreported.

No. 09-1158 (*Cal. Pharm.*). This petition seeks review of four opinions issued by the Ninth Circuit on March 3, 2010. Two of the opinions are reported, 596 F.3d 1098 and 596 F.3d 1087. *Cal. Pharm.* Pet. App. 1, 59. Two of the opinions are not reported. *Id.* at 37, 53. In one of the appeals, *see id.* at 37, the Ninth Circuit previously had issued an order granting an injunction pending appeal, *id.* at 42, which is reported at 563 F.3d 847. Three of the district court opinions that led to the Ninth Circuit decisions, *Cal. Pharm.* Pet. App. 84, 106, and 128, are reported at, respectively, 630 F. Supp. 2d 1144, 630 F. Supp. 2d 1154, and 603 F. Supp. 2d 1230, while the remainder are not reported. *Cal. Pharm.* Pet. App. 152, 161, 176, 178, 180.

No. 10-283 (*Santa Rosa*). This petition seeks review of an unreported decision of the Ninth Circuit. *Santa Rosa* Pet. App. 1. The district court orders that led to the Ninth Circuit's opinion also are unreported. *Id.* at 5, 7, 9.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit issued the opinions at issue in No. 09-958 (*Indep. Living*) on July 9, 2009 and August 7, 2009, and denied the Department of Health Care Service's (DHCS's) Petitions for Rehearing and Rehearing En Banc on, respectively, October 29, 2009 and September 23, 2009. The petition was timely filed on February 16, 2010, following orders extending the time to file.

The Ninth Circuit issued the four opinions at issue in No. 09-1158 (*Cal. Pharm.*) on March 3, 2010, and the petition for writ of certiorari was filed on March 24, 2010.

The Ninth Circuit issued the opinion at issue in No. 10-283 (*Santa Rosa*) on May 27, 2010, and the petition for writ of certiorari was filed on August 25, 2010.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), states in pertinent part:

> (a) Contents
>
> A State plan for medical assistance must –
>
> * * *
>
> (30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

The state statutory reductions at issue are reproduced in the appendices to the petitions for certiorari in these consolidated cases, as follows:

No. 09-958 (*Indep. Living*)

Cal. Welf. & Inst. Code § 14105.19(b)(1) (enacted Feb. 16, 2008), reproduced at *Indep. Living* Pet. App. 158; *see also Indep. Living* Pet. App. 162.

No. 09-1158 (*Cal. Pharm.*)

Cal. Welf. & Inst. Code § 14105.191(b)(2)(F) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 205-06 (at issue in 9th Cir. No. 09-55532).

Cal. Welf. & Inst. Code §§ 14105.191(b)(1), 14105.191(b)(2)(B), (D), (E), 14166.245(b)(2)(A), (c)(3)(B) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 205-06, 211, 213-14 (at issue in 9th Cir. No. 09-55365).

Cal. Welf. & Inst. Code § 14105.191(b)(3) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 206 (at issue in 9th Cir. No. 09-55692).

Cal. Welf. & Inst. Code § 12306.1(d)(6) (enacted Feb. 20, 2009), reproduced at *Cal. Pharm.* Pet. App. 224 (at issue in 9th Cir. No. 09-16359).

No. 10-283 (*Santa Rosa*)

Cal. Welf. & Inst. Code § 14166.245(b), (c)(3) (enacted Feb. 16, 2008), reproduced in *Santa Rosa* Pet. App. 25-26; *see also Santa Rosa* Pet. App. 28, 31, 35, 38.

STATEMENT OF THE CASE

Facing a devastating, ongoing, and deepening financial crisis, the California Legislature enacted a series of statutory reforms directed towards reducing the costs and increasing the efficiency of the State's Medicaid program, known as Medi-Cal. At issue here are reductions that the Legislature enacted in 2008 and 2009 to payments made to certain types of Medi-caid providers (e.g., pharmacists, Adult Day Health Centers (ADHCs), and hospitals for various types of services), and a reduction enacted in 2009 to the State's contribution to rates paid by counties to providers of In-Home Supportive Services (IHSS).

The Ninth Circuit affirmed injunctions of, or ordered enjoined, all of the enactments challenged by respondents on the ground that they are preempted by 42 U.S.C. § 1396a(a)(30)(A) (hereinafter, § 30(A)). The court recognized that § 30(A) does not confer any "rights" that may be enforced by private parties under 42 U.S.C. § 1983. The court held, nonetheless, "that 'a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created "right," in the sense that term has recently been used in suits brought under § 1983.'" *Cal. Pharm.* Pet. App. 46; *see also Indep. Living* Pet.74-75, 83-84, 92-93. The issue thus presented is whether private parties may assert a preemption claim under the Supremacy Clause to enforce a federal Spending Clause statute, § 30(A), where, *inter alia*, Congress itself has not created a private cause of action to enforce the statute;

Congress has vested enforcement of the statute in an administrative agency; the legislative history confirms congressional intent to preclude, rather than permit, private challenges; and this Court repeatedly has held that the Supremacy Clause does not create any rights.

A. Statutory and Regulatory Background

Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse providers for covered health care services rendered to Medicaid-eligible individuals. 42 U.S.C. §§ 1396 *et seq*. A state's participation in Medicaid is voluntary, but if it chooses to participate, it must comply with the Medicaid Act and implementing regulations promulgated by the Secretary of the United States Department of Health and Human Services (HHS). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

To receive funds, a state must administer its Medicaid program through a state plan approved by HHS. 42 U.S.C. § 1396a. The federal statute at issue here requires that a state plan for medical assistance

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough

> providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

A state may modify its state plan by submitting a state plan amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) for approval. 42 C.F.R. §§ 430.12 *et seq*. Anticipating that compliance issues might arise, Congress provided for an administrative remedy should a state be found not in compliance with its plan: "after reasonable notice and opportunity for hearing," HHS may withhold or limit "further payments" to a state until it is satisfied with the state's compliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Under HHS regulations, if a state's Medicaid expenditures are disallowed by HHS, the state may repay the funds through an "adjustment" to a "subsequent grant award." 42 C.F.R. §§ 430.33(c)(3), 430.42(a), (d); *see also id.* § 430.35(d). Alternatively, a state may arrange to repay disallowed funds in installments. *Id.* § 430.48. If a state disagrees with a notice of disallowance (or of disapproval of a SPA), it may request an administrative hearing. *Id.* §§ 430.60 *et seq*.

Private parties, such as Medicaid beneficiaries and providers, may participate in such hearings, either as "parties" or as "amicus curiae," depending on the nature of their interests in the matter. 42

C.F.R. § 430.76.[2] In connection with such hearings, CMS (and any party) may conduct discovery and offer evidence, including expert opinion testimony. *Id.* §§ 430.83, 430.86, 430.88. A state may appeal an adverse final determination to the United States Court of Appeals for the circuit in which the state is located. *Id.* §§ 430.38, 430.102. Private parties may appeal only if they fall within the zone of interests sought to be protected by the statutory provision at issue. *See* 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997).

---

[2] Respondents (and some of the amici in the present cases) are actively participating as amici in CMS's administrative proceedings with respect to the SPAs at issue in these cases. *See, e.g.*, Joint Petition for Participation in Administrative Hearing, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Jan. 3, 2011) (submitted on behalf of, *inter alia*, California Hospital Association, California Pharmacists Association, and Independent Living Center of Southern California); AARP's Application for Leave to File *Amicus Curiae* Brief and Proposed *Amicus Curiae* Brief Urging Affirmance of CMS' Decision Disapproving Proposed California State Plan Amendments, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Feb. 3, 2011); Letter from Mary Staples, Regional Director, State Government Affairs, National Association of Chain Drug Stores, to Benjamin Cohen, Presiding Officer, Centers for Medicare and Medicaid Services (Jan. 5, 2011). CMS has approved the petitions to file amicus briefs. *See* Email from Benjamin R. Cohen, Presiding Officer, to David Hoskins *et al.*, Re: Petitions to Participate in Hearing on Reconsideration of California State Plan Amendments (Feb. 10, 2011).

B. Facts

Respondents challenge three sets of Medicaid reforms that California enacted in February 2008, September 2008, and February 2009, as part of a comprehensive, and continuing, effort to address the State's daunting fiscal crisis in a responsible manner. Most of the reforms reduced payments to providers of various types of services by a percentage, ranging from 1% to 10% depending on the nature of the service or type of provider. *See, e.g.*, Cal. Welf. & Inst. Code §§ 14105.19(b)(1), 14166.245(b), (c)(3) (Feb. 2008); *id.*, §§ 14105.191(b)(1)-(3), 14166.245(b), (c) (Sept. 2008). One set of reforms did not reduce payments to providers, but instead reduced the State's maximum contribution to wages and benefits paid by the counties to Medicaid providers of In Home Supportive Services. *Id.*, § 12306.1(d)(6) (Feb. 2009). The methodology for determining overall payments for such services (i.e., collective bargaining between counties and unions) did not change. *Cal. Pharm.* Pet. App. 63-64, 66, 163-64.[3]

---

[3] As petitioners previously advised the Court, the reductions at issue in *Independent Living*, S. Ct. No. 09-958, sunset on February 28, 2009, although that petition continues to present a live controversy because the State challenges the propriety of overpayments that it made to providers as a result of improper injunctions affirmed in the underlying appeals, and because the issues raised are recurring. *See Indep. Living* Pet. App. 44-48. Moreover, the district court has stayed *Independent Living*, including certain providers' already-filed motion seeking additional retroactive relief with respect to the statutory reductions

(Continued on following page)

C. Proceedings Below

In the seven decisions at issue in these three consolidated petitions for certiorari, the Ninth Circuit affirmed every district court order granting an

---

that sunset on February 28, 2009, pending a decision from this Court on whether a Supremacy Clause claim may be maintained. *Indep. Living Ctr. of So. Cal. v. Shewry*, No. CV 08-3315 (C.D. Cal. June 17, 2010) (order granting DHCS's application for stay of trial court proceedings). In March and April 2011, the California Legislature enacted legislation that will affect some of the reductions at issue in *California Pharmacists*, S. Ct. No. 09-1158, and *Santa Rosa*, S. Ct. No. 10-283, including (1) new reductions that will replace the AB1183 reductions upon federal approval; and (2) elimination of the AB5 reductions and AB1183 CMAC-5% cap on payments to noncontract hospitals for inpatient services beginning April 13, 2011. *See* Cal. Welf. & Inst. Code §§ 14105.191, 14105.192 (as amended and enacted by Cal. Stats. 2011, ch. 3 (A.B.97), §§ 93.2, 93.5); *id.* § 14166.245(j) (as amended by Cal. Stats. 2011, ch. 19 (S.B.90), § 4). The Legislature also provided that the AB1183 reductions will become "inoperative for dates of service after June 1, 2011," *see* Cal. Welf. & Inst. Code § 14105.191(j) (as amended by Cal. Stats. 2011, ch. 3 (A.B.97), § 93.2), although DHCS anticipates trailer bill legislation to clarify that the AB1183 reductions will remain in place until new rate reductions take effect following federal approval. The *California Pharmacist* and *Santa Rosa* petitions (along with *Independent Living*) continue to present live controversies because (1) the changes are contingent on events that have not yet occurred, such as federal approval; (2) even after the changes take effect, the propriety of overpayments that the State contends it has made pursuant to injunctions entered in those cases will remain live, as it does in *Independent Living*; and (3) the issue raised herein will recur until or unless it is resolved by this Court. *See Cal. Pharm.* Pet. App. 228-42 (describing dozens of Supremacy Clause cases filed in the wake of *Independent Living I*).

injunction, and reversed the one district court order denying an injunction. *See Cal. Pharm.* Pet. 37, 106. As a consequence, every Medicaid reform challenged by private parties on appeal has now been enjoined.

The Ninth Circuit first recognized a Supremacy Clause cause of action to enforce § 30(A) in *Independent Living Center of Southern California v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) (*Independent Living I*), *see Indep. Living* Pet. App. 58, a precursor to the appeals at issue in No. 09-958 (*Independent Living II* and *III*). The court recognized that, pursuant to its prior decision in *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), § 30(A) does not confer any "rights" on private parties that are enforceable under § 1983. *Id.* at 65-66, 92-93.[4] Consistent with *Sanchez*, the court acknowledged that respondents "do not seek to enforce any substantive 'right' conferred by statute." *Indep. Living* Pet. App. 92-93. However, it characterized DHCS's reliance on *Sanchez* as "misplaced," because "our decision in [*Sanchez v.*] *Johnson* had nothing to say about a claim for injunctive relief brought under the Supremacy Clause." *Id.* at 87. The court thus sidestepped *Sanchez* by "holding that a party may seek injunctive relief under the Supremacy

---

[4] In *Sanchez*, the Ninth Circuit had held that § 30(A) cannot be enforced by Medicaid beneficiaries or providers under § 1983 because it does not confer any "rights" on any private parties and because it requires balancing of "indeterminate and competing" policy objectives that are "ill-suited" for judicial enforcement. 416 F.3d at 1059-62.

Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs." *Indep. Living* Pet. App. 83; *see also id.* at 84 (holding "the 'rights' requirement inapplicable to ILC's claims in this case"). In support, the Ninth Circuit noted that this Court "has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." *Id.* at 68; *see also id.* at 68-83 (citing, *inter alia*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003)). DHCS filed a petition for certiorari seeking review of this decision, which the Court denied on June 22, 2009 (S. Ct. No. 08-1223).

The petition in *Independent Living* (S. Ct. No. 09-958) concerns appeals from the district court's decisions on remand of *Independent Living I*. On August 18, 2008 and November 17, 2008, the district court entered two orders enjoining DHCS from implementing payment reductions as to, *inter alia*, pharmacists, physicians, dentists, ADHCs, and providers of non-emergency transportation services and home health services. *Indep. Living* Pet. App. 94, 133. On August 27, 2008, the district court amended its August 18, 2008 injunction to provide only prospective relief. *Id.* at 125-26.

On appeal, the Ninth Circuit affirmed both district court injunctions. *Indep. Living* Pet. App. 1, 54 (*Independent Living II* and *III*). The court acknowledged that § 30(A) "does not create any

federal 'rights' enforceable under § 1983." *Indep. Living* Pet. App. 13, n.10 & 15-16 (citing *Sanchez*). But the court denied as "moot" DHCS's effort to reargue whether private parties may sue to enforce § 30(A) under the Supremacy Clause, citing its decision in *Independent Living I*. *Id.* at 8 n.7. The court also reversed the district court's August 27, 2008 order, and held that providers in *Independent Living II* were entitled to retroactive damages from the date that the reductions at issue in that case took effect (i.e., July 1, 2008) until the injunctions were entered. *Id.* at 29-37; *see also id.* at 46-47.

In the *California Pharmacists* appeals (No. 09-1158), the Ninth Circuit applied and expanded on its theory. DHCS had opposed the injunctions in those cases contending, *inter alia*, that providers' economic injury is not a harm that § 30(A) was designed to protect against. In rejecting this argument, the Ninth Circuit reiterated "that 'a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created "right," in the sense that term has recently been used in suits brought under § 1983, but need only satisfy traditional standing requirements.'" *Cal. Pharm.* Pet. App. 46. The court then elaborated: "A cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is

not rights based." *Id.* at 47; *see also id.* at 32-33, 38-39.[5] Instead, "private parties [may] enforce the structural relationship between the federal and state governments . . . as, essentially, private enforcers of the Supremacy Clause; the specific relationship of those parties to the federal statute on which the Supremacy Clause cause of action is premised does not matter." *Id.* at 48.

SUMMARY OF ARGUMENT

Congress must create any private cause of action to enforce a federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The Ninth Circuit and respondents acknowledge that Congress has not created a private cause of action to enforce § 30(A). Nonetheless, the Ninth Circuit held in these cases that the Supremacy Clause creates a private cause of action to enforce § 30(A) against a state, and that "rights" and congressional intent are irrelevant to whether such a cause of action exists. The Ninth Circuit is wrong: the Supremacy Clause cannot, by itself, create a cause of action, and any cause of action to enforce a federal statute must come from Congress. Were it to stand, the Ninth Circuit's analysis would

[5] The remaining Ninth Circuit decisions at issue in S. Ct. Nos. 09-1158 and 10-283 applied *Independent Living I* without further analysis. Except for the unpublished decision in *Santa Rosa*, all of the decisions were issued by the same panel that decided *Independent Living I*.

fundamentally alter the traditional separation of powers among the branches and transform the courts into all-purpose regulatory enforcers of Spending Clause enactments.

I.a. Congress's exclusive prerogative to determine who may enforce federal statutes, and how, is well-settled. *Sandoval*, 532 U.S. 275; *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011); *Gonzaga*, 536 U.S. at 280. Where (as here) Congress has not expressly created a private cause of action to enforce a federal statute, this Court has required private parties to demonstrate, *inter alia*, that Congress created an individualized "right" in favor of plaintiffs, and that Congress intended to provide a private remedy. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also Gonzaga*, 536 U.S. at 282. These principles are grounded in separation of powers, and prevent the judiciary from becoming embroiled in disputes that Congress has not assigned to it. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008).

b. Under a straightforward application of this Court's precedent, § 30(A) may not be enforced by private parties. Section 30(A) does not contain an express cause of action, nor does it satisfy the requirements for private enforcement under § 1983 or *Cort v. Ash*, as respondents concede. *See Gonzaga*, 536 U.S. at 280-86, 290; *Cort*, 422 U.S. at 78. Although the Ninth Circuit recognized that § 30(A) does not confer any privately enforceable rights, that court held that private parties can enforce it anyway, under

the Supremacy Clause. The Ninth Circuit did not grapple with *Gonzaga*, but simply dismissed such precedent as irrelevant. *See Cal. Pharm.* Pet. App. 48; *see also Indep. Living* Pet. App. 87. Because Congress did not create a cause of action to enforce § 30(A), an essential fact that no one disputes, the present cases should be dismissed under a straightforward application of *Gonzaga* and *Cort*.

c. Implying a cause of action to enforce § 30(A) would frustrate, rather than further, congressional intent, in numerous respects. Contrary to congressional intent, private suits have driven up Medicaid costs in California and elsewhere; undermined the national uniformity of federal Medicaid requirements; and resulted in an unworkable regulation-by-injunction system in which the States cannot predict their Medicaid costs with accuracy and are subjected to massive unfunded liabilities when they guess incorrectly what a court might do. Moreover, private lawsuits interfere with the administrative enforcement mechanism that Congress created to ensure the States' compliance with the Medicaid Act. The injunctions issued in the present cases, for example, have prejudiced California in the administrative proceedings pending as to the reductions at issue, because they have caused CMS to become concerned about retroactive liability that providers might face if it approves the SPAs. *See* Brief for the United States as Amicus Curiae, App. 3a, *Independent Living*, S. Ct. No. 09-958 (filed Dec. 3, 2010). The legislative history does not contain any hint that Congress intended for

private parties to enforce § 30(A). To the contrary, in 1997 Congress repealed a different Medicaid provision (the Boren Amendment) in an effort to preclude exactly the type of challenge to Medicaid ratemaking that private parties are now seeking to assert under § 30(A).

II. Respondents cannot obtain a different result by recasting their claims to sound in preemption. Whether characterized as § 1983 claims or preemption claims, respondents' efforts to enforce § 30(A) "are in substance one and the same," and "[t]heir treatment, therefore, must be the same, '[n]o matter the clothing in which [private parties] dress their claims.'" *Astra*, 131 S. Ct. at 1345 (quoting *Tenet v. Doe*, 544 U.S. 1, 8 (2005)). Private parties should not be able to use the Supremacy Clause to effectuate an end run around *Gonzaga*, *Cort*, *Sandoval*, and congressional intent.

a. The Supremacy Clause cannot supply a cause of action to enforce a federal statute because the Clause does not confer any substantive "rights." *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Rather, the history of its adoption, its placement in Article VI, and this Court's precedent all confirm a different role for the Clause: it supplies a rule of decision – that federal law trumps conflicting state law – in cases that are properly before a court. Without a declaration of supremacy, the Framers were concerned that

state court judges might continue to apply a then existing rule of construction that, among "equal" sovereigns, a later enactment trumps an earlier enactment. *The Federalist* No. 78, at 394-95 (I. Shapiro ed., 2009) (Alexander Hamilton); James Madison, Vices of the Political System of the United States (1787), *in* 2 *The Writings of James Madison* 364-65 (G. Hunt ed., 1901). Thus, to the Framers' thinking, the Supremacy Clause merely confirmed a self-evident truth (the supremacy of federal law) that flows from the nature of a national government. *The Federalist* No. 33, at 159, 161 (Alexander Hamilton).

b. Moreover, the Supremacy Clause and preemption have no role in a dispute over a state's compliance with a funding condition set forth in a Spending Clause statute. The relationship between the federal and state governments in this context is defined *not* by the supremacy of federal law, but by the quasi-contractual agreement between the governments. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). After all, through the Spending Clause, Congress may entice states to voluntarily accept obligations that it could not directly mandate. *N.Y. v. United States*, 505 U.S. 144, 166-67 (1992). If a state fails to comply with a federal condition for receiving federal funding under the Medicaid Act, the state is not in "conflict" with federal law, as Congress expressly anticipated that such noncompliance could occur, and provided the remedy (i.e., loss of federal funding). 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35.

These features set the present case apart from a "classic" preemption case, where a state seeks to exercise regulatory power in an area that Congress has taken exclusively for itself. Such true "conflicts" between state and federal law typically arise in cases concerning interstate commerce, international commerce, and foreign relations – those aspects of the national Union that the Framers sought to protect following unsatisfactory experiences under the Articles of Confederation. But a state's failure to satisfy a federal funding condition, as to a voluntary program in which it is not required to participate, does not frustrate the national purposes for which the Union was formed.

c. Finally, several different strands of prudential standing bar any claims that respondents may have. Because any right to hold the State to its Medicaid obligations under § 30(A) belongs to the federal government exclusively, respondents cannot satisfy the requirement that their lawsuits seek to vindicate rights personal *to them*. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). In addition, respondents do not "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982). And lastly, the notion that providers may sue as "private enforcers" of "the proper constitutional structural relationship between the state and federal governments," *see Cal. Pharm.* Pet. App. 33, 39, 47-48, notwithstanding their lack of

any injury cognizable under § 30(A), cannot be reconciled with this Court's repeated rejection of such "generalized grievances" as a basis for private suits. *See Valley Forge*, 454 U.S. at 483-84.

ARGUMENT

I. PRIVATE PARTIES CANNOT ENFORCE § 30(A) BECAUSE CONGRESS HAS NOT CREATED A PRIVATE CAUSE OF ACTION TO ENFORCE THIS FEDERAL STATUTE

Respondents, who are private parties, seek to enforce a federal statute, § 30(A). Respondents concede, however, that Congress has not created a private cause of action to enforce § 30(A). Moreover, implying a private cause of action to enforce § 30(A) would conflict with congressional intent. Because respondents do not have a cause of action to enforce § 30(A), the Ninth Circuit's decisions in these cases should be reversed, and respondents' cases must be dismissed.

A. Only Congress Can Create a Private Cause of Action to Enforce a Federal Statute

As the entity that enacts federal statutes, Congress alone has the power to determine who may enforce them. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532

U.S. 275, 286 (2001); *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011); *Horne v. Flores*, 129 S. Ct. 2579, 2598 n.6 (2009). Particularly when Spending Clause provisions are involved, clear evidence of congressional intent to create a private right of action is required: "[U]nless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). In these respects, private enforcement of federal statutes differs from private enforcement of *constitutional* obligations: "[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The principle that Congress alone determines who may enforce federal statutes is grounded in separation of powers. "In the absence of congressional intent the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008) (quoting *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (1951)). This Court has repeatedly reaffirmed this principle. *See, e.g., Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) ("Congress rather than the courts controls the availability of remedies for violations of statutes.");

Passman, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner.").

To ensure that private lawsuits to enforce federal statutes only proceed consistent with congressional intent, this Court has developed two separate tests that apply when (as here) Congress does not make its intentions express. Both tests require a congressionally-created, individualized "right" in favor of the plaintiff. First, a private cause of action may be implied from a federal statute if a plaintiff can demonstrate, *inter alia*, that the statute "create[s] a federal right in favor of the plaintiff"; there is "legislative intent . . . to create [but not] . . . deny" a private remedy; and implying a private remedy would be consistent with the "underlying purposes of the legislative scheme." *Cort v. Ash*, 422 U.S. 66, 78 (1975). Alternatively, a private cause of action may proceed under 42 U.S.C. § 1983 if a plaintiff can show that Congress has conferred an individual right on a private party; the right is not so "'vague and amorphous' that its enforcement would strain judicial competence"; and the provision is "'couched in mandatory, rather than precatory, terms.'" *Gonzaga*, 536 U.S. at 282. These tests ensure that private enforcement proceeds only as Congress intended, and avoid embroiling the judiciary in controversies that Congress has not assigned to it. *See Wilder*, 496 U.S. at 508 n.9 ("The [*Cort*] test reflects a concern, grounded

in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."). In addition, these tests help ensure that federal courts do not become obliged to adjudicate issues for which judicial enforcement is not necessary or appropriate.

B. Section 30(A) Does Not Create a Private Cause of Action

It is undisputed that Congress did not confer any private rights when it enacted § 30(A), and therefore that Congress itself has not created a private cause of action to enforce this federal statute. The Ninth Circuit, itself, has held that § 30(A) does not contain any rights-creating language, and that the statute's text and structure reflect congressional intent that it be enforced administratively. *Sanchez v. Johnson,* 416 F.3d 1051, 1059-62 (9th Cir. 2005). In *Sanchez*, the Ninth Circuit explained that § 30(A) does not meet the criteria for private enforcement because, *inter alia*, the statute confers no "rights" on providers or beneficiaries, and is "ill-suited" for judicial enforcement because it incorporates "nebulous," "indeterminate[,] and competing" policy goals. *Id.* at 1059-60 ("The tension between these statutory objectives supports the conclusion that § 30(A) is concerned with overall methodology rather than conferring

individually enforceable rights on individual Medicaid recipients.").[6]

In the present cases, the Ninth Circuit did not purport to overrule *Sanchez*, but simply held that it is "inapposite" because respondents are suing under the Supremacy Clause instead of under § 1983. *Cal. Pharm.* Pet. App. 48; *see also Indep. Living* Pet. App. 87 ("[O]ur decision in [*Sanchez v.*] *Johnson* had nothing to say about a claim for injunctive relief brought under the Supremacy Clause."). The Ninth Circuit acknowledged that respondents are not seeking to enforce any statutory right, but held that rights are irrelevant in a Supremacy Clause cause of action. *Indep. Living Pet.* at 13 ("In this case . . . Independent Living does not seek direct enforcement

---

[6] Virtually every other circuit to consider this issue since *Gonzaga* has reached the same conclusion. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57-58 (1st Cir. 2004); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147 (2d Cir. 2006) (per curiam); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 703-04 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 34 (2008); *Westside Mothers v. Olszewski*, 454 F.3d 532, 542 (6th Cir. 2006); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-48 (10th Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007); *see also Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 541-42 (3d Cir. 2002) (Alito, J.). The Eighth Circuit alone has reached a contrary result, although its decision recently was called into question. *Compare Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013-16 (8th Cir. 2006), *cert. granted, judgment vacated in part*, 551 U.S. 1142 (2007) (mem.) *with Minn. Pharmacists Ass'n v. Pawlenty*, No. 09-2723, 2010 U.S. Dist. LEXIS 11620 (D. Minn. Feb. 10, 2010).

of any 'rights' created by § 30(A)."); *Cal. Pharm.* Pet. at 32-33, 38-39, 46-48; *see also Indep. Living* Pet. at 87 (discussing *Sanchez*); *id.* at 92-93 ("They do not seek to enforce any substantive 'right' conferred by statute.").

Respondents have irrevocably conceded that § 30(A) does not confer any individual rights. Not a single respondent, in the seven appeals now consolidated before this Court, argued below that *Sanchez* was wrongly decided. To the very limited extent that they acknowledged *Sanchez* in their briefs, respondents dismissed it as "inapplicable and irrelevant." *See, e.g.*, Appellee's Answering Brief 10, No. 08-56422, Docket Entry No. 31 (9th Cir. Nov. 13, 2008) ("Hence the *Sanchez* rules which *are applicable only to § 1983 claims*, are inapplicable and irrelevant in the Supremacy Clause case at bar.").[7]

Because only Congress may create a right of action to enforce § 30(A), and because Congress did not do so here as respondents concede, respondents lack a cause of action. Congress has not spoken with a "clear voice" and manifested an "'unambiguous'

---

[7] *See also* 9th Cir. No. 08-56422, Docket Entry No. 28, at 13-14; 9th Cir. No. 08-56422, Docket Entry No. 98, at 9-10; 9th Cir. No. 08-57016, Docket Entry No. 13, at 21-23; 9th Cir. No. 09-55532, Docket Entry No. 16, at 7; 9th Cir. No. 09-55532, Docket Entry No. 20, at 28 n.6; 9th Cir. No. 09-55365, Docket Entry No. 49, at 14-15; 9th Cir. No. 09-16359, Docket Entry No. 9, at 23 n.28 & 35-36; 9th Cir. No. 09-16359, Docket Entry No. 38, at 43-45; 9th Cir. No. 09-17633, Docket Entry No. 13, at 46.

intent to confer individual rights" under § 30(A), as required by *Gonzaga*, *Sandoval*, and *Cort*.

C. Implying a Cause of Action Would Contravene Congressional Intent

Not only would implying a cause of action contravene multiple lines of this Court's decisions requiring creation of a "right" before a private cause of action may proceed, to imply a cause of action here would frustrate specific congressional intent regarding the Medicaid Act. Congressional intent is paramount in a preemption context, no less than in any other context involving enforcement of federal statutes. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) ("'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'"). Congress's purposes include preserving and enhancing the States' flexibility to control and reduce costs and increase the efficiency of Medicaid; centralizing enforcement authority in HHS; and protecting the States from private lawsuits that drive up the cost of Medicaid. These purposes are reflected in the text and structure of § 30(A) and in the legislative history – purposes that are directly undermined by the Ninth Circuit's holdings here.

1. Implying a private cause of action to enforce § 30(A) is inconsistent with the statutory framework and, in particular, Congress's decision to centralize enforcement authority in HHS. *See Long Term Care Pharmacy Alliance*, 362 F.3d at 58; *Sanchez*, 416 F.3d

at 1059-61; *see also Astra*, 131 S. Ct. at 1349 (holding that private enforcement of obligations owed by pharmaceutical companies to the federal government under Medicaid's 340B program would undermine Congress's intent for centralized enforcement). Private suits undermine the key benefits of a centralized administrative enforcement scheme: national uniformity, consistency, and predictability in interpretation and administration of federal law. Indeed, states in the Ninth Circuit are now subject to onerous, judicially created requirements that apply nowhere else in the country.[8] This is the antithesis of how the system is supposed to work. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring) (contrasting "the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking" with the "comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages").

---

[8] For example, the Ninth Circuit alone requires states to consider providers' costs in ratemaking, and to conduct a certain kind of pre-enactment "study" before reducing rates. *Compare Indep. Living* Pet. App. 10-12, 19-20, 55-56; *Cal. Pharm.* Pet. App. 3, 11-17, 36 *with Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851-53 (3d Cir. 1999); *Minn. HomeCare Ass'n v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997) (per curiam); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996); *see also Pa. Pharmacists*, 283 F.3d at 538; *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 933 n.33 (5th Cir. 2000), *overruled in part on other grounds, Equal Access for El Paso*, 509 F.3d at 704.

In addition, regulation by litigation makes it virtually impossible for states to plan and budget their Medicaid obligations. As the system is supposed to work, the States communicate regularly with CMS, even obtaining guidance memoranda as issues arise. Such communication reduces the likelihood that a state will guess incorrectly how CMS will interpret a Medicaid obligation and face substantial unplanned liabilities as a result. Litigation is far more unpredictable: California's failure to correctly predict how the Ninth Circuit would interpret § 30(A) has already cost its Medicaid program well over $1 billion in unanticipated expenses – exactly the result that the Court has explained should be avoided. *Pennhurst*, 451 U.S. at 16 ("[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (cautioning against "government by injunction").

Private lawsuits also interfere with, and disrupt, CMS's own enforcement procedures. Again, this is vividly demonstrated in the present cases, where the injunctions have *materially altered and prejudiced* California's ability to obtain CMS approval of its still-pending SPAs. As this Court is already aware, in November 2010, CMS denied *all* of California's pending SPAs citing, *inter alia*, concern about the destabilizing effect on access to services if providers were required to repay funds issued pursuant to the pending injunctions. *See* Brief for the United States as

Amicus Curiae, App. 3a, *Independent Living*, S. Ct. No. 09-958 (filed Dec. 3, 2010) ("Additionally, CMS is concerned that, given the time that has elapsed since these SPAs were submitted, the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate access concerns."). These are issues that should be worked out between CMS and the States in the administrative process created by Congress, with participation by providers and beneficiaries in that process *as contemplated by HHS regulations*, and without the confounding impact of court injunctions. 42 C.F.R. §§ 430.76, 430.83, 430.86, 430.88.

2. The legislative history confirms that permitting private enforcement of § 30(A) would frustrate Congress's purposes. In enacting and amending § 30(A), Congress has repeatedly underscored that states must have substantial flexibility to innovate and run their Medicaid programs cost-effectively. Lawsuits are antithetical to that flexibility, as Congress made clear when it repealed a different provision (the Boren Amendment) that previously had been interpreted by the courts as a vehicle for bringing precisely the type of private challenges to Medicaid rates at issue here.

Section 30(A) was adopted in 1967 as a cost-saving measure, and required the States to include in their state plans methods and procedures to "safeguard against unnecessary utilization" of Medicaid services and to assure that payments to providers were not "in excess of reasonable charges consistent

with efficiency, economy, and quality of care." Social Security Amendments of 1967, Pub. L. No. 90-248, § 237(b), 81 Stat. 821, 911 (1968). In 1981, Congress deleted the "reasonable charges" requirement from § 30(A) in response to complaints that it hampered the States' abilities to innovate cost-effective approaches to provider reimbursement. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2174, 95 Stat. 357, 809 (1981); H.R. Rep. No. 97-158, Pt. 2, at 312-33 (1981). Congress hoped that this and other amendments would "reduce Federal outlays in Medicaid . . . in a manner which . . . provides the States with flexibility to institute a number of measures in their programs to reduce cost and make them more efficient." H.R. Rep. No. 97-158, Pt. 2, at 279.[9] There is no suggestion in the legislative history of § 30(A) that Congress intended for private parties to enforce § 30(A), although there are numerous references to enforcement by HHS. *See, e.g.*, S. Rep. No. 90-744, at 28, 160 (1967), *reprinted in* 1967

---

[9] Additional amendments to § 30(A) were made in 1972 and 1989. *See also* Social Security Amendments of 1972, Pub. L. No. 92-603, § 237(a)(2), 86 Stat. 1329, 1416 (1972) (requiring use of "utilization review plans" for some providers); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260 (1989) (adding objective that payments be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area," as part of series of amendments intended to reduce infant mortality); H.R. Rep. No. 101-247, at 389-90 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2115-16.

U.S.C.C.A.N. 2834, 2867, 3023; H.R. Rep. No. 101-247, at 390-91, *reprinted in* 1989 U.S.C.C.A.N. at 2116-17.

Congress's belief that private suits challenging the adequacy of Medicaid payments are antithetical to state flexibility is demonstrated by its repeal of the Boren Amendment following *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). The Boren Amendment required states to "find[] and make assurances satisfactory to the Secretary" that the Medicaid rates paid for skilled nursing facility and intermediate care facility services "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" to provide care in compliance with applicable state and federal law requirements. Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 962(a), 94 Stat. 2599 (1980). In *Wilder*, the Court held that the Boren Amendment conferred a "right" on providers, enforceable under § 1983, to "reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility." 496 U.S. at 510. *Wilder* sparked a nationwide explosion of provider lawsuits challenging the adequacy of state Medicaid rates.[10]

---

[10] *See, e.g., Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306 (2d Cir. 1991); *Erie County Geriatric Ctr. v. Sullivan*, 952 F.2d 71 (3d Cir. 1991); *Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991); *Abbeville General Hosp. v. Ramsey*, 3 F.3d 797 (5th Cir. 1993); *Ill. Health Care Ass'n v. Bradley*, 983 F.2d 1460 (7th

(Continued on following page)

Congress responded by repealing the Boren Amendment in 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). In so doing, Congress repeatedly expressed its intent to eliminate private lawsuits in order to give the States more flexibility in setting Medicaid rates and to reduce Medicaid costs. A House committee report stated:

> A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations.[¶]. . . . It is the Committee's intention that, following enactment of this Act, *neither this nor any other provision of Section 1902* [of the Social Security Act, i.e., 42 U.S.C. § 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities *relative to the adequacy of the rates they receive.*

H.R. Rep. No. 105-149, at 590-91 (1997) (emphasis added); *see also* 143 Cong. Rec. S6301-02, S6305 (1997) (statement of Sen. Domenici) ("Provide flexibility *instead of the rigidity brought on by lawsuits*. The Boren amendment should be dead." (emphasis added)). The Congressional Budget Office had estimated that Boren's repeal would reduce Medicaid spending

---

Cir. 1993); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536 (10th Cir. 1994).

by about $1.2 billion from 1998 to 2002 – an estimate that "assumes that reimbursement rates for institutional providers would increase more slowly than if providers could *continue to use the threat of Boren suits as leverage against the states*." H.R. Rep. No. 105-149, at 625 (1997) (emphasis added).[11]

In short, by its repeal of Boren, Congress made clear that private lawsuits challenging the adequacy of rates impose an unacceptable burden on state flexibility. To paraphrase Senator Domenici, these types of lawsuits "should be dead." *See* 143 Cong. Rec. at S6305. The Ninth Circuit's effort to revive them must be rejected.

II. THE SUPREMACY CLAUSE DOES NOT PROVIDE A MECHANISM FOR CIRCUMVENTING *GONZAGA*, *SANDOVAL*, AND *CORT*

Respondents' position may be summarized succinctly: "[t]he claim that only Congress can create a right to sue to protect oneself against injury from

---

[11] *See also* 143 Cong. Rec. at S6305 (statement of Sen. Gramm) ("The Boren amendment has produced endless lawsuits. States want to negotiate with hospitals and get the best rate they can. Repealing the Boren amendment takes it out of the courts."); 143 Cong. Rec. S6058-04, S6068 (1997) (statement of Sen. Roth) (repeal of Boren Amendment "will take the providers and the States out of the Federal courts and put them back at the contract negotiating table"); 142 Cong. Rec. S5305-05, S5355 (1996) (statement of Sen. Chafee) (repeal "will allow States to establish their own reimbursement rates and free them from much of the litigation that now exists").

preempted state action, is hookum [sic] and bunkum." Appellee's Answering Brief 9, No. 08-56422, Docket Entry No. 31 (9th Cir. Nov. 13, 2008). According to respondents, the Constitution *always* creates a cause of action to enforce a federal statute when it allegedly conflicts with state law, and "Congressional intent is not relevant" as to whether such a cause of action exists. Brief in Opposition 13, *Maxwell-Jolly v. Santa Rosa Memorial Hospital*, No. 10-283 (filed Oct. 27, 2010). Respondents squarely reject, therefore, the proposition that Congress alone determines who may enforce federal statutes; and they reject the proposition that congressional intent is even relevant, much less *dispositive*, on whether statutes may be privately enforced.

Respondents are wrong. As this Court recently explained in *Astra*, another case involving private parties' efforts to enforce Medicaid obligations owed to the federal government in the absence of a right to sue: "[t]he absence of a private right to enforce the statutory . . . obligations would be rendered meaningless if [private parties] could overcome that obstacle by" simply recasting the theory under which their claims are brought. *Astra*, 131 S. Ct. at 1348. Respondents' suits to enforce § 30(A), whether characterized as § 1983 claims or preemption claims, "are in substance one and the same" and "[t]heir treatment, therefore, must be the same, '[n]o matter the clothing in which [private parties] dress their claims.'" *Id.* at 1345 (quoting *Tenet v. Doe*, 544 U.S. 1, 8 (2005)). The Court should reject respondents' invocation of the

Supremacy Clause to effectuate an end run around *Gonzaga* and *Cort*.

A. The Supremacy Clause Provides a Rule of Decision Rather than a Cause of Action

1. The Supremacy Clause cannot, on its own, supply respondents with a cause of action. This Court has repeatedly held that the Supremacy Clause is not a "source of any federal rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Thus, the Court has contrasted the Supremacy Clause, which is "'not a source of any federal rights,'" with the Commerce Clause, which "of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis*, 498 U.S. at 450. And the Court repeatedly has rejected use of the Supremacy Clause to constitutionalize claims that are fundamentally statutory. *Golden State*, 493 U.S. at 107; *Chapman*, 441 U.S. at 615; *Swift & Co. v. Wickham*, 382 U.S. 111, 126 (1965) (Supremacy Clause was not a "substantive provision of the Constitution" requiring a three-judge court, under a statute requiring such a panel to restrain enforcement of a state statute "upon the ground of the unconstitutionality of such statute"). Of course, that is exactly what respondents are seeking to do in the present case: to constitutionalize,

via the Supremacy Clause, a claim that a state allegedly is not complying with § 30(A).

Instead, the Supremacy Clause operates to supply a rule of decision for parties who are properly before the court. *Chapman*, 441 U.S. at 613 (while the Supremacy Clause "is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law"); *Swift*, 382 U.S. at 120 ("[I]f a state measure conflicts with a federal requirement, the state provision must give way."); *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1234 (2009) (McConnell, J., dissenting) ("The Supremacy Clause is not an independent source of rights but a rule of priority that determines who wins when state and federal law conflict."), *on reh'g en banc*, 632 F.3d 1162 (10th Cir. 2011); *see also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2088 (2000) ("[T]he Supremacy Clause . . . prescribed a constitutional choice of law rule, one that gives federal law precedence over conflicting law."); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250 (2000) (similar).

2. This understanding of the Supremacy Clause follows from the circumstances of its adoption. Under the Framers' conception, the Supremacy Clause was not intended to confer any substantive rights or powers on Congress, private parties, or anyone else. Rather, it was adopted to eliminate an ambiguity that persisted, under the Articles of Confederation and then contemporary choice-of-law rules, regarding

what law courts should apply when faced with a conflict between state and federal law.

The Supremacy Clause, like the Constitution as a whole, emerged from dissatisfaction with the Articles of Confederation, and particularly the new government's inability to bind the States in matters affecting interstate commerce, domestic security, and foreign relations. Perceived weaknesses under the Articles included lack of state compliance with the Treaty of the Peace in the aftermath of the Revolution; conflicts between states with respect to navigable waters; and other forms of commercial protectionism from which "the national dignity, interest, and revenue, [have] suffered." James Madison, Vices of the Political System of the United States (1787), *in* 2 *The Writings of James Madison* 362-63 (G. Hunt ed., 1901); *see also The Federalist* No. 22, at 107-08, 113 (I. Shapiro ed., 2009) (Alexander Hamilton); *The Federalist* No. 42, at 216 (James Madison); Records of the Federal Convention, *in* 4 *The Founders' Constitution* 593 (Kurland ed., 1987) (statement of Mr. Wilson); *see generally* Christopher R. Drahozal, *The Supremacy Clause* 4-11 (2004).

One concern was whether state judges would apply federal or state law when they were in conflict, given the traditional presumption of implied repeals:

> Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter . . . is of posterior date to the former, . . . it will be at least questionable whether the latter . . . must not prevail; and

> as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.

Madison, Vices of the Political System of the United States, *supra*, at 364-65; *see also The Federalist* No. 78, at 394 (Alexander Hamilton) (duty of judges faced with conflicting laws to harmonize them or, if that is not possible, "the last in order of time shall be preferred").

To address this last question, the delegates to the Constitutional Convention considered several options, including: "1. a Veto on the passage of the State laws. 2. a Congressional repeal of them, 3. a Judicial annulment of them." Letter from James Madison to N. P. Trist (Dec. 1831), *in* 3 *The Records of the Federal Convention of 1787*, at 516 (Farrand ed., 1937). James Madison and Charles Pinkney, among others, proposed to give Congress the "power of negativing" conflicting state laws after they were enacted. *See* Records of the Federal Convention, *in* 4 *The Founders' Constitution*, *supra*, at 592-96. Opponents of the "negativing" power were concerned about its potential for abuse, or thought it "unnecessary, as the Courts of the State would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Id.* at 593-95. Proponents did not want to depend on the "firmness of Judges," and therefore believed that "[i]t will be better to prevent the passage of an improper law, than to declare it void when passed." *Id.* at 596 (statement of Mr. Wilson). Nonetheless, the delegates ultimately rejected conferring a "negativing" power on Congress in favor of the declaration of "supremacy"

now found in Article VI. *Id.* at 596; *see also The Federalist* No. 80, at 401 (Alexander Hamilton); *see generally* Drahozal, *supra*, 12-25.

The Framers understood that a declaration of Supremacy would change the normal rules of construction. Alexander Hamilton explained that, where statutes conflict of "an EQUAL authority," the later-in-time will prevail under existing rules of construction applied by the courts. *The Federalist* No. 78, at 394 (Alexander Hamilton). However, a "prior act of the superior [authority] ought to be preferred to the subsequent act of an inferior and subordinate authority." *Id.* at 394-95. "[A]ccordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." *Id.* at 395; *see also The Federalist* No. 80, at 401 (Alexander Hamilton) (Convention rejected the "direct negative on State laws" in favor of "an authority of the federal courts to overrule such as might be in manifest contravention of the articles of Union").

During the debates preceding ratification, the Framers took pains to explain that this was *all* that the Supremacy Clause would accomplish. "[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government *would be precisely the same*, if [the Necessary and Proper Clause and the Supremacy Clause] were entirely obliterated. . . . They are *only declaratory of a truth* which would have resulted by necessary and unavoidable implication from the very act of constituting

a federal government, and vesting it with certain specified powers." *The Federalist* No. 33, at 159 (Alexander Hamilton) (emphasis added); *see also id.* at 161 ("[T]he clause which declares the supremacy of the laws of the Union . . . only declares a truth, which flows immediately and necessarily from the institution of a federal government."). Writing after the fact, Joseph Story explained that the Supremacy Clause, and particularly its concluding words ("any thing in the constitution or laws of any state to the contrary notwithstanding"), were "introduced from abundant caution, to make its obligation more strongly felt by the state judges." 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1833, at 697 (Fred B. Rothman & Co. 1991) (1833); *see also id.*, § 1836, at 701 ("From this supremacy of the constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by congress or by a state legislature void.").

The placement of the Supremacy Clause in Article VI (rather than in Article I, section 8) of the Constitution confirms the proper understanding of the Clause as a choice-of-law provision rather than a substantive source of rights. "On its face, the Supremacy Clause only prescribed a constitutional choice of law rule, one that gives federal law precedence over conflicting law. If the Clause were meant to be an affirmative grant of Congressional power, it would likely reside in the metropolis of Congressional

power, Article I, Section 8 . . . rather than in the suburbs of Article VI." Dinh, *supra*, at 2088.

3. *Ex parte Young*, 209 U.S. 123 (1908), did not change this understanding of the Supremacy Clause. This Court did not purport to create, in *Ex parte Young*, a new, standalone, private cause of action to enforce federal statutes, but only described an "exception" to the States' immunity under the Eleventh Amendment where a party sues a state official to enjoin a state enforcement action. *See Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). An exception to immunity is the nonexistence of a defense, not a cause of action. Moreover, "[t]he Court wields *Young* in the name of the Supremacy Clause only to vindicate important federal rights." *Va. Office for Protection & Advocacy*, 131 S. Ct. at 1644 (Kennedy, J., concurring); *accord*, *id.* at 1638 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). Here, there is no federal right to vindicate.

4. Confronted with a correct reading of the Supremacy Clause, respondents note that this Court often has issued preemption decisions without first analyzing whether any congressionally conferred right existed. The lack of discussion of "rights" in the case law does not mean that such "rights" did not exist, but may simply be a vestige of an "*ancien régime*," in which "rights" were not analyzed with the rigor with which they are today. *See Sandoval*, 532 U.S. at 287; *Gonzaga*, 536 U.S. at 283. Where the rights issue *has* been raised, so far as petitioners can

determine, this Court has never held that a private cause of action exists to enforce a federal statute that all parties concede does not satisfy the requirements for private enforcement set forth in *Gonzaga* and *Cort*.

This Court's preemption cases generally fall into two, somewhat overlapping, categories, both of which are consistent with *Sandoval* and *Gonzaga*, and neither of which involves the type of rights-less, standalone cause of action at issue here. The first category consists of preemption cases in which the Court expressly found, or assumed, the existence of an individually enforceable federal right. *See, e.g.*, *Golden State Transit*, 493 U.S. at 109 (holding that preempting federal statute, "the NLRA[,] gives . . . rights enforceable against governmental interference"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from *interfering with federal rights*." (emphasis added)); *Gibbons v. Ogden*, 9 Wheat. 1, 210 (1824) (under the Supremacy Clause, courts determine "validity" of state law that "come[s] into collision with an act of Congress, and deprive[s] a citizen *of a right* to which that act entitles him" (emphasis added)). In addition, in some cases, although individual rights were not expressly identified as such, they likely existed. *See, e.g., Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 283 (2006) (enforcing anti-lien provision of Medicaid Act, 42 U.S.C. § 1396p, mandating that "[n]o lien may be imposed against the

property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan").[12] The present cases do not fall into this category as they involve no substantive federal right, whether implied, express, or assumed.

The second category includes cases in which preemption is asserted as a defense, rather than as a standalone cause of action. Such defenses are raised in one of two ways: either (1) the party is a defendant in a civil proceeding, such as a tort case or a local enforcement action, and the party raises preemption as an affirmative defense to liability in that case;[13] or (2) the party is a plaintiff in a lawsuit filed to forestall future state (or local) enforcement of state (or local) regulation of the party's conduct, and the party asserts a preemption defense on an anticipatory basis before such enforcement has occurred.[14] Such cases

---

[12] In addition, a number of this Court's preemption cases involved statutes expressly preempting state law or prohibiting state regulation, statutory language that may supply the congressional intent needed to support an implied right of action. *See, e.g., Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) (NBA); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (FAAAA); *Watters v. Wachovia*, 550 U.S. 1 (2007) (NBA); *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005) (FIFRA); *Engine Mfrs. Ass'n v. South Coast Air Quality*, 541 U.S. 246 (2004) (CAA); *Shaw*, 463 U.S. 85 (ERISA).

[13] *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

[14] *See, e.g., Cuomo*, 129 S. Ct. 2710; *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408 (2008); *Rowe*, 552

(Continued on following page)

are easily harmonized with *Sandoval* and *Gonzaga* because they do not involve a standalone cause of action to enforce federal law, but instead involve preemption solely as a defense to state regulation of a defendant's (or putative defendant's) conduct. *See Wilderness Soc'y*, 581 F.3d at 1233 (McConnell, J., dissenting) (availability of preemption "defense" to state enforcement proceedings does not mean that anyone "can bring a freestanding preemption claim to enforce compliance with federal law, as if 'preemption' were a cause of action"). The present cases do not fall into this category, either: Medicaid beneficiaries and providers are not raising preemption as a defense to regulation of their conduct, but rather as a standalone cause of action to force the State to take affirmative action in order to conform the State's conduct with respondents' notions of what federal law requires.[15]

U.S. 364; *Watters*, 550 U.S. 1; *Engine Mfrs.*, 541 U.S. 246. Such cases typically are brought as declaratory judgment actions. In addition, a private cause of action may exist for the specific purpose of enjoining anticipated state enforcement proceedings. *See Va. Office for Protection & Advocacy*, 131 S. Ct. at 1642 (Kennedy, J., concurring); *Golden State*, 493 U.S. at 113, 119 (Kennedy, J., concurring); John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997 (2008) (discussing bill in equity to "restrain proceedings at law"), *cited with approval*, 131 S. Ct. at 1642 (Kennedy, J., concurring).

[15] To the two categories of preemption cases identified above may be added a third: the federal government may sue to enjoin state law that purportedly is preempted by federal law. *See, e.g., Cuomo*, 129 S. Ct. at 2714; *see also Verizon Md., Inc. v. Public*

(Continued on following page)

Thus, the Ninth Circuit's creation of a standalone Supremacy Clause cause of action cannot be reconciled with the Constitution's structure or history, or with this Court's precedent. The Ninth Circuit's cause of action bears no resemblance whatsoever to the Framers' conception of the Supremacy Clause as a rule of construction to support nullification of state law as necessary to protect federal rights. Instead, the Ninth Circuit used the Supremacy Clause to create a cause of action that Congress itself declined to create, complete with retroactive damages *and* injunctive relief. *See Indep. Living* Pet. App. 29-37 (reversing district court's order to extent that it ordered purely prospective relief, and authorizing retroactive relief as well); *id.* at 46-47 ("Independent Living was entitled to money damages for the Director's past conduct.").[16] Because no such cause of action exists, the decisions at issue must be reversed.

Serv. Comm'n, 535 U.S. 635, 640-41 (2002) (federal government intervened in private lawsuit and filed petition for certiorari).

[16] Although the Ninth Circuit rejected the proposition that retroactive damages were barred by the State's immunity (a holding that California disputes but does not challenge at this time), the court never addressed the entirely separate question of the source of a court's authority to award money damages in a preemption case. There is none.

B. Cases Involving Spending Clause Legislation are Particularly Inappropriate for the Supremacy Clause

Moreover, Spending Clause legislation is a particularly inappropriate context for raising up standalone causes of action that Congress declined to create. Principles of supremacy, and of preemption generally, have no application to allegations that a state has failed to satisfy a federal funding condition.

The relationship between the federal and state governments with respect to Spending Clause legislation such as the Medicaid Act is defined not by the supremacy of federal law, but by the terms of the quasi-contractual agreement between the state and federal governments. *See Pennhurst*, 451 U.S. at 17; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Through the Spending Clause, Congress may entice the States to accept obligations that it may not directly mandate. *N.Y. v. United States*, 505 U.S. 144, 166-67 (1992). Thus, in the Spending Clause context, it is a state's voluntary agreement to be bound, rather than the inherent supremacy of federal law, that obligates a state to comply with any federal requirements.[17]

---

[17] Congress *could* have included within that agreement a right for private parties to enforce § 30(A), as it has done for other provisions of the Medicaid Act, but it did not do so. *See, e.g., Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) ("reasonable promptness" and "freedom of choice," 42 U.S.C. §§ 1396a(a)(8), (a)(23)), *cert. denied*, 522 U.S. 1243 (2008); *Harris v. Olszewski*, 442 F.3d

(Continued on following page)

The remedy for any noncompliance with respect to the Medicaid Act, therefore, is supplied not by the Supremacy Clause, but by the terms of the State's contract with the federal government. And that remedy is clearly and unambiguously set forth in a statute: the Secretary of HHS is authorized to withhold federal financial participation in cases of noncompliance. *See* 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Indeed, the Medicaid Act and its implementing regulations anticipate that instances of noncompliance may arise. And they expressly contemplate repayment of disallowed funds rather than negation of the State's action (assuming the State does not opt voluntarily to comply). *See* 42 C.F.R. §§ 430.33(c)(3), 430.35(d), 430.42(a),(d), 430.48.

The Supremacy Clause cannot be used to "invalidate" or declare "null and void" a state's Medicaid payments, because a state is free to retain its (purportedly noncomplying) payment scheme. In enacting Medicaid, Congress did not strip the States of their power to regulate, but merely imposed conditions for

---

456 (6th Cir. 2006) ("freedom of choice," 42 U.S.C. § 1396a(a)(23)); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) ("making medical assistance available," 42 U.S.C. § 1396a(a)(10)); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004) (EPSDT services for recipients under the age of twenty-one, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a), 1396d(r)(5)); *Beeker v. Olszewski*, 415 F. Supp. 2d 734 (E.D. Mich. 2006) (no denial of service based on inability to pay, 42 U.S.C. § 1396o(e)); *Meachem v. Wing*, 77 F. Supp. 2d 431 (S.D.N.Y. 1999) (fair hearings, 42 U.S.C. § 1396a(a)(3)).

the receipt of federal funds. Consistent with the voluntary nature of the Spending Clause contract, if a state fails to comply with federal Medicaid law, the state faces a choice: it can either continue to apply its law (and face federal enforcement), or it can bring its action into compliance with federal law. *See Pennhurst*, 451 U.S. at 28-30 & n.23. Simply put, if a state fails to comply with a federal condition for receiving federal funding, the state is not in "conflict" with federal law, as Congress expressly anticipated that such noncompliance could occur, and provided the remedy. 42 U.S.C. § 1396c.

Respondents thus seek to apply the Supremacy Clause where it does not belong. As discussed *supra* Part II.A, the Supremacy Clause was adopted to protect Congress's exercise of power particularly with respect to commerce and treaties – areas in which Congress may exercise exclusive regulatory (i.e., preempting) authority. *See Gibbons*, 9 Wheat. at 199-200 ("[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."). State economic regulations that affect interstate or international commerce may raise special concerns – i.e., the potential to frustrate the national purposes for which the Union was formed – that justify less judicial deference than other forms of state action. By contrast, a state's purported failure to satisfy a voluntary federal funding condition, and the risk that it may forfeit federal funding as a result,

does not frustrate the national purposes for which the Union was formed.[18]

C. Respondents Cannot Overcome Prudential Standing Limitations to Assert Any Claims They May Have

Even if respondents somehow could identify a vehicle for their arguments, their claims would be barred by three separate strands of prudential standing jurisprudence. Prudential standing "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citations omitted). Like the requirements for private lawsuits set forth in *Cort* and *Gonzaga*, prudential standing principles protect the judiciary from becoming embroiled in issues and disputes that properly belong to another branch. *Warth*, 422 U.S. at 500; *Valley Forge Christian*

---

[18] Put another way, the Framers anticipated that the Supremacy Clause would operate to prevent state interference with Congress's exercise of its *enumerated powers under the Constitution*. *The Federalist* No. 33, at 161 ("It will not, I presume, have escaped observation, that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*") (Alexander Hamilton); *see also* Story, *supra*, § 1831, at 694 ("It will be observed, that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution."). No one has alleged that California has prevented the exercise of, or otherwise interfered with, Congress's authority under the Spending Clause. Congress remains free to spend – or withhold – its money on the Medicaid program, notwithstanding any purported violation by a state of a funding condition.

College v. Americans United for Separation of Church & State, 454 U.S. 464, 474 (1982). Although the Ninth Circuit did not reach these issues overtly, in three separate decisions in the *California Pharmacists* appeals, the court expressly rejected the proposition that *anything* more than Article III standing is required to assert a Supremacy Clause claim. *Cal. Pharm.* Pet. App. 46 (a plaintiff pursuing a Supremacy Clause Claim does not need a federally created "right," "but *need only satisfy traditional standing requirements*" (emphasis added)); *see also id.* 32-33, 38-39.[19] This is because, the court explained, "the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights based." *Cal. Pharm.* Pet. App. 47; *see also id.* 32-33, 38-39. Rather, according to the Ninth Circuit, anyone can act as a "private enforcer[] of the Supremacy Clause," irrespective of their "specific relationship" to the federal statute at issue. *Cal. Pharm.* Pet. App. 48.

---

[19] Citing *Warth v. Seldin*, DHCS argued in two appeals (*California Pharmacists* and *Independent Living IV*) in the Ninth Circuit that prudential standing principles barred respondents' claims because they did not assert any "rights" of their own. Defendant-Appellant David Maxwell-Jolly's Opening Brief 30-33, No. 09-55692, Docket Entry No. 12 (9th Cir. June 19, 2009); Defendant-Appellant's Opening Brief 22 n.10, No. 09-55532, Docket Entry No. 11 (9th Cir. May 19, 2009). In *Santa Rosa*, DHCS asserted that providers' claims are barred by the zone-of-interest component of prudential standing. Appellant's Opening Brief 36, No. 09-17633, Docket Entry No. 6 (9th Cir. Dec. 17, 2009).

The same defects that doom respondents' claims under *Cort* and *Gonzaga* also bar their claims under prudential standing principles.

First, respondents cannot satisfy the requirement that their lawsuits seek to vindicate their own rights, rather than those belonging to a third party. *See Warth*, 422 U.S. at 499 (prohibition against "rest[ing] [a] claim to relief on the legal rights or interests of third parties"). Here, lacking any legally enforceable right themselves, respondents seek instead to enforce the undisputed right of a third party – the United States government – to hold California to its Medicaid obligations. But the federal government is the best proponent of its own rights. 42 U.S.C. § 1396c; *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). Respondents' attempt to enforce an obligation owed not to them, but to the federal government, thus runs directly afoul of the prohibition against resting a claim entirely on the rights of third parties. *See, e.g., Wilderness Soc'y*, 632 F.3d at 1170-72 (prudential standing principles barred lawsuit by environmental organizations seeking to enforce the federal government's property rights).

Second, the providers' claims do not "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 475; *see also Bennett*, 520

U.S. at 163.[20] There is no indication that Congress intended § 30(A) to protect providers' interests in Medicaid rate-setting. *See Sanchez*, 416 F.3d at 1059-60; *see also supra* Part I.C (discussing congressional intent to preclude suits). Accordingly, their claims are barred on this independent basis.

Third, the Ninth Circuit's conception of Medicaid providers as "private enforces of the Supremacy Clause" runs afoul of the prohibition against private lawsuits premised on "generalized grievances." A claim to "enforce the proper structural constitutional relationship between the state and federal governments," *Cal. Pharm.* Pet. App. 47, which is devoid of any judicially cognizable injury, is an archetypal generalized grievance. *See Valley Forge*, 454 U.S. at 483-84 ("This Court repeatedly has rejected claims of standing predicated on '"the right, possessed by every citizen, to require that the Government be administered according to law."'"); *see also Warth*, 422 U.S. at 499-500; *Schlesinger*, 418 U.S. at 223-25.

* * *

California's Medicaid program has lost over a billion dollars since the Ninth Circuit first recognized a Supremacy Clause cause of action to enforce § 30(A)

---

[20] Medicaid beneficiaries also do not fall within the "zone of interests" that § 30(A) was designed to protect, as the statute is concerned with ratemaking in the aggregate rather than with the rights of beneficiaries. *See Sanchez*, 416 F.3d at 1059-60. However, DHCS did not make this argument below.

in *Independent Living I*, and California is losing tens of millions more each month that injunctions issued pursuant to that authority remain in place. In addition to costing California enormous sums of money, the lawsuits have interfered with the centralized administrative enforcement process created by Congress for holding the States to their Medicaid obligations. None of these injunctions should ever have issued, because these disputes belong not in the courts but before HHS, as Congress intended. The Court should reject respondents' efforts to invoke the Supremacy Clause to effectuate an end-run around congressional intent and this Court's decisions in *Gonzaga*, *Sandoval*, and *Cort*. And it should clarify that any remedy for a state's purported breach of a funding condition must be provided by Congress, through the legislation it enacts, rather than by the Constitution.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Dated: May 19, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
SUSAN M. CARSON
JENNIFER M. KIM
Supervising Deputy
Attorneys General
GREGORY D. BROWN
CARMEN SNUGGS
Deputy Attorneys General

*Counsel of Record
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036-3306
(202) 326-6010

RECORD AND BRIEFS

Nos. 09-958, 09-1158, 10-283

JUL 29 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, PETITIONER,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL.

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, ET AL., PETITIONERS,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, PETITIONER,

v.

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INTERVENOR RESPONDENTS IN NO. 09-958 AND *CALIFORNIA PHARMACISTS* RESPONDENTS IN NO. 09-1158

CRAIG J. CANNIZZO
LLOYD A. BOOKMAN
JORDAN B. KEVILLE
FELICIA Y SZE
HOOPER, LUNDY & BOOKMAN, P.C.
1875 Century Park East,
Suite 1600
Los Angeles, CA 90067

DEANNE E. MAYNARD
Counsel of Record
SETH M. GALANTER
NICHOLAS GEORGE MIRANDA
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-8740
dmaynard@mofo.com

JULY 29, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTION PRESENTED

Whether persons harmed by a state law may maintain an action in federal court to enjoin state officials from enforcing that law on the ground that it is preempted under the Supremacy Clause by federal law, namely 42 U.S.C. § 1396a(a)(30)(A).

CORPORATE DISCLOSURE

The non-individual respondents who file this brief have no parent corporations and no publicly held company owns any stock in these respondents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT 3

A. Statutory Framework 3

B. California's Challenged Conduct 4

C. Proceedings Below 7

SUMMARY OF ARGUMENT 13

ARGUMENT 18

I. The Acknowledged And Longstanding Equitable Cause Of Action To Keep Government Officials Within The Scope Of Their Authority Includes Suits By Injured Individuals To Enjoin Implementation Of State Laws That Conflict With Federal Law 19

A. A Cause Of Action To Enjoin State Officials From Implementing Preempted State Laws Has Been Recognized By This Court For Almost Two Centuries 20

1. Individuals harmed by state officials' implementation of preempted state laws have a federal cause of action to enjoin such conduct 20

TABLE OF CONTENTS – Continued

Page

2. The scope of the equitable cause of action includes all persons injured by preempted state laws, and is not limited to claims that merely raise defenses anticipatorily 27

B. Congress Has Ratified The Existing Equitable Cause Of Action To Enjoin Conduct Implementing Preempted State Laws By Enacting Specific Federal Laws That Address It, Rather Than Abolish It..... 31

C. Section 1983 Was Not Intended To Limit This Distinct Cause Of Action... 35

D. Respondents Do Not Need A "Right" In Order To Fall Within The Existing Equitable Cause Of Action 39

II. Congress In The Medicaid Act Did Not Preclude Reliance On The Existing Cause Of Action To Enforce The Supremacy Clause 42

A. Medicaid, Like Other Statutes Enacted Pursuant To The Spending Clause, Is Federal Law And Preempts Contrary State Law Pursuant To The Supremacy Clause 42

B. In Medicaid, Congress Did Not Create Any Centralized Oversight Scheme That Displaced The Federal Courts' Authority To Enjoin Implementation Of Preempted State Laws..... 46

TABLE OF CONTENTS – Continued

Page

C. Congress Did Not Preclude Private Enforcement Of Section 30(A)'s Preemptive Effect 53

1. Section 30(A) contains judicially enforceable standards that preempt contrary state laws 54

2. Congress intentionally preserved private enforcement of Section 30(A) even while eliminating the Boren Amendment 57

III. Petitioners' Invocation Of Prudential Standing Is Misplaced And Waived 59

CONCLUSION 62

TABLE OF AUTHORITIES

Page

CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 24

Alexander v. Sandoval, 532 U.S. 275 (2001) 40

American Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 24

American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 21

Arkansas Med. Soc'y Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 57

Aroostook Band of Micmacs v. Ryan, 404 F.3d 48 (1st Cir. 2005) 41

Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986) 35

Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342 (2011) 16, 41, 42, 49

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 25

Bennett v. Arkansas, 485 U.S. 395 (1988) 43

Bond v. United States, 131 S. Ct. 2355 (2011) 18, 19, 23, 60, 61

Brown v. Hotel & Rest. Emps. Int'l Union Local 54, 468 U.S. 491 (1984) 22

Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1983) 40

TABLE OF AUTHORITIES – Continued

Page

California Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc., 519 U.S. 316 (1997) 29

Carter v. Greenhow, 114 U.S. 317 (1885) 36

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) 24, 25

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) 38

City of Phila. v. New Jersey, 430 U.S. 141 (1977) 23

Correctional Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 22

Cort v. Ash, 422 U.S. 66 (1975) 15, 40

Craig v. Boren, 429 U.S. 190 (1976) 59

Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996), rev'd, 523 U.S. 574 (1998) 22

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 28, 29

Dalton v. Little Rock Family Planning Servs., 516 U.S. 474 (1996) 29

Dalton v. Specter, 511 U.S. 462 (1994) 24

Dennis v. Higgins, 498 U.S. 439 (1991) 37

Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 44, 51, 52

TABLE OF AUTHORITIES – Continued

Page

Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 29

Ex parte Young, 209 U.S. 123 (1908).....*passim*

FERC v. Mississippi, 456 U.S. 742 (1982).....44

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).....32

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 22, 23

Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs, 44 F.3d 1178 (3d Cir.), cert. denied, 516 U.S. 815 (1996).....34

Frew ex rel. Frew v. Hawkins, 540 U.S. 431 (2004).....44

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989).....*passim*

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).....39, 40, 47, 56

Hagans v. Lavine, 415 U.S. 528 (1974).....23, 39, 52

Harmon v. Brucker, 355 U.S. 579 (1958).....24

Hibbs v. Winn, 542 U.S. 88 (2004) 35

Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).....44

Holland v. Florida, 130 S. Ct. 2549 (2010).....30

Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900) 36, 37

Hutto v. Finney, 437 U.S. 678 (1978).....38

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 30

Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962) 33

Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985) 42

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 41

Maine v. Thiboutot, 448 U.S. 1 (1980) 52, 53

McCulloch v. Maryland, 17 U.S. 316 (1819) 61

Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 57

Michigan Cent. R.R. v. Michigan Pub. Util. Comm'n, 271 F. 319 (E.D. Mich. 1921) 32

Mitchum v. Foster, 407 U.S. 225 (1972) 38

Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995) 22

National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) 62

New York v. United States, 505 U.S. 144 (1992) 44, 45

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998) 10, 56, 58

Osborn v. Bank of the United States, 22 U.S. 738 (1824) 2, 20, 25

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 43

TABLE OF AUTHORITIES – Continued

Page

Perez v. Campbell, 402 U.S. 637 (1971) 29

Pharmaceutical Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 29

Philpott v. Essex Cnty. Welfare Bd., 409 U.S. 413 (1973) 43

Pierce Cnty., Wash. v. Guillen, 537 U.S. 129 (2003) 46

Planned Parenthood of Houston & Se. Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005) 21

Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health, No. 1:11-CV-630, 2011 WL 2532921 (S.D. Ind. June 24, 2011) 50

Public Utils. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) 34

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 40

Rosado v. Wyman, 397 U.S. 397 (1970) 46

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 45

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000) 58

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 26

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 47

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 41

TABLE OF AUTHORITIES – Continued

Page

Smith v. Wade, 461 U.S. 30 (1983) 38

Suter v. Artist M., 503 U.S. 347 (1992) 53

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 21, 33

Thompson v. North Am. Stainless, LP, 131 S. Ct. 863 (2011) 62

Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006) 25

Verizon Maryland Inc. v. Public Serv. Comm'n, 535 U.S. 635 (2002) 26, 41, 45

Virginia Office for Protection & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) 44, 47

Visiting Nurse Ass'n of N. Shore, Inc. v. Bullen, 93 F.3d 997 (1st Cir. 1996), cert. denied, 519 U.S. 1114 (1997) 56

White v. Greenhow, 114 U.S. 307 (1885) 36

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) 46, 52, 57

U.S. CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. Art. VI, cl. 2 (Supremacy Clause) ..... *passim*

20 U.S.C. § 1232g(g) 47

28 U.S.C. § 1331 ..... 26, 38, 39

28 U.S.C. § 1341 35

28 U.S.C. § 1342 34

28 U.S.C. § 2281 (repealed) 32

42 U.S.C. § 1316(c) 7

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1320a-2 53

42 U.S.C. § 1320a-10 53

42 U.S.C. § 1395ww(d)(7) 58

Title XIX of the Social Security Act (Medicaid), 42 U.S.C. § 1396 et seq.

§ 1396a(a) 3, 58

§ 1396a(a)(30)(A) ..... *passim*

§ 1396n(f)(2) 3, 48

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988(b) 38

47 U.S.C. § 252(e)(5) 45

Judicial Code of 1911, ch. 231, 36 Stat. 1087 32

Johnson Act of 1934, ch. 283, 48 Stat. 775 34

Tax Injunction Act of 1937, ch. 726, 50 Stat. 738 34

Pub. L. No. 90-248, 81 Stat. 821 (1968) 54

Pub. L. No. 94-182, 89 Stat. 1051 (1975) 51

Pub. L. No. 94-381, 90 Stat. 1119 (1976) 32

Pub. L. No. 94-552, 90 Stat. 2540 (1976) 52

Pub. L. No. 97-35, 95 Stat. 357 (1981) 54

Pub. L. No. 101-239, 103 Stat. 2106 (1989) 55

Pub. L. No. 103-382, 108 Stat. 3518 (1994) 53

Pub. L. No. 103-432, 108 Stat. 4398 (1994) 53

TABLE OF AUTHORITIES – Continued

Page

42 C.F.R.

§ 430.15(b) 47

§ 430.20(b)(2) 3

§ 430.76(b) 48

57 Fed. Reg. 917 (Jan. 9, 1992) 56

STATE STATUTES

Cal. Health & Safety Code § 1570.2 8

Cal. Welf. & Inst. Code

§ 14000.3 4

§ 14000.4 4

§ 14019.4(a) & (c) 4, 27

§ 14020 4

§ 14105.19 5

§ 14105.191 5

§ 14123(a) 27

Assembly Bill 1183, 2008 Cal. Stat. c. 758 ... 5, 6, 12, 13

Assembly Bill X3 5, 2009-2010 Cal. Stat., 4th Ex. Sess., c. 5 ..... 5, 6, 8, 11

Assembly Bill 97, 2011 Cal. Stat. c. 3 6

Assembly Bill 102, 2011 Cal. Stat. c. 29 6

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Cong. Globe, 42d Cong., 1st Sess. (1871):

App. 69-70 37

App. 221 37

46 Cong. Rec. (1911):

3998 32

4001 32

4002 32

Governors' Perspective on Medicaid: Hearing Before the S. Comm. on Finance, 105th Cong. (1997) 57

H.R. 2491, 104th Cong. (1995) 59

H.R. 3734, 104th Cong. (1996) 58

H.R. Rep. No. 94-1122 (1976) 51, 52

H.R. Rep. No. 97-158 (1981) 55

H.R. Rep. No. 101-247 (1989) 55, 56

H.R. Rep. No. 104-350 (1995) (Conf. Rep.) 59

H.R. Rep. No. 104-651 (1996) 58

H.R. Rep. No. 105-149 (1997) 58

S. 1956, 104th Cong. (1996) 58

S. Rep. No. 94-1240 (1976) 52

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (3d ed. 2008) 22, 41

Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867 (1969-1970) 24

Note, *Limitation of the Jurisdiction of the Federal District Courts in Public Utility Rate Litigation*, 20 Iowa L. Rev. 128 (1934-1935) 33

Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* (5th ed. 2003) 22, 38

The Kaiser Family Foundation, *Medicaid Payments per Enrollee, FY2007* 5

Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 Harv. L. Rev. 623 (1927-1928) 32

United States Government Accountability Office, *Medicaid Managed Care: CMS's Oversight of States' Rate Setting Needs Improvement*, GAO-10-810 (2010) 48

U.S. Amicus Br., *Gonzaga Univ. v. Doe*, No. 01-679 (Feb. 2002) 43

TABLE OF AUTHORITIES – Continued

Page

U.S. Amicus Br., *Lapides v. Board of Regents of Univ. of Ga. Sys.*, No. 01-298 (Dec. 2001) 43

U.S. Br. in Opp., *Haveman v. Westside Mothers*, No. 02-277 (Oct. 2002) 43

U.S. Reply Br., *Verizon Md. Inc. v. Public Serv. Comm'n*, Nos. 00-1531, 00-1711 (Nov. 2001).....26

INTRODUCTION

Respondents established that they would experience immediate irreparable injury to their health and finances if petitioners, California state officials, were permitted to implement a state law requiring draconian cuts to the rates the state officials were paying medical service providers to provide health care to poor and disabled Californians.[1] The case comes to this Court on the premise—found by the courts below and not on review here—that the state law petitioners sought to implement conflicted with federal law, namely 42 U.S.C. § 1396a(a)(30)(A) (Section 30(A)).

Respondents sought and obtained injunctions from a federal court to stop these officials from implementing the state law that was preempted under the Supremacy Clause. This action is authorized by a

---

[1] The intervenor respondents in No. 09-958 are the Sacramento Family Medical Clinics, Inc.; Theodore Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services. The plaintiffs in the so-called *California Pharmacists* action of No. 09-1158 are the California Hospital Association; California Association for Adult Day Services; Acacia Adult Day Services; Sharp Memorial Hospital; Grossmont Hospital Corporation; Sharp Chula Vista Medical Center; Sharp Coronado Hospital and Healthcare Center; Fe Garcia; Charles Gallagher; the California Pharmacists Association; California Medical Association; California Dental Association; South Sacramento Pharmacy; Farmacia Remedios, Inc.; and Marin Apothecary, Inc. d/b/a Ross Valley Pharmacy. As petitioners acknowledge (Pet. Br. iii n.1), the last six plaintiffs listed were named in the No. 09-1158 petition but were not parties in the court of appeals and thus are not respondents.

host of this Court's decisions, including such notable ones as *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), and *Ex parte Young*, 209 U.S. 123 (1908).

Petitioners and the United States each start their briefs with extensive arguments that Section 30(A) does not confer a "right" as that term has been interpreted for purposes of 42 U.S.C. § 1983. But whether there is such a Section 1983 "right" under Section 30(A) does not answer the question at issue here: whether respondents can seek relief in federal court to enjoin conduct by state officials that is preempted under the Supremacy Clause by federal law.

As to that question, there is no dispute by petitioners or their amici that, apart from Section 1983, this Court repeatedly has acknowledged and acted on its power to hear such claims. It is this cause of action that is the basis for these suits. Nothing in Section 1983 or its jurisprudence overrules or limits this other avenue of relief. Section 1983 serves a different purpose and provides different remedies.

The absence of the injunctive remedy sought here would severely undermine the Supremacy Clause and the liberty promoted by our federalism. This is particularly true in a case such as this where, even following federal agency disapproval of the rate cuts, the relevant federal agency has not successfully stopped petitioners from continued implementation of those cuts. Instead, those lower rates remain in

effect except to the extent barred by the federal court injunctions at issue here.

STATEMENT

A. Statutory Framework

1. Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (Medicaid Act), is a cooperative federal-state program that provides federal financial assistance to participating States to enable them to provide medical treatment for the poor, elderly, and disabled.

To receive federal funds, States are required to establish and administer their Medicaid programs through individual "State plans for medical assistance" approved by the federal Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396a(a). The State must comply with the approved plan until it either withdraws from the program or HHS approves an amendment to the state plan. 42 C.F.R. § 430.20(b)(2).

When a state plan amendment is submitted to HHS, HHS has 90 days to make a determination whether the amendment complies with the Medicaid Act. 42 U.S.C. § 1396n(f)(2). If HHS does not act within this time frame, the state plan amendment is considered approved. *Ibid.* If however, HHS asks for more information from the State, HHS has a second 90-day time frame, beginning on the date the requested information is received from the State. *Ibid.*

The Medicaid Act provides specific requirements for state plans and reimbursement rates. Section 30(A), the provision at issue in this case, provides that a state plan

> must * * * provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

B. California's Challenged Conduct

1. California law authorizes the State to apply for federal financial assistance in Medicaid through a state program called Medi-Cal. *See* Cal. Welf. & Inst. Code §§ 14000.3, 14000.4, 14020. Medical service providers who participate in Medi-Cal must accept the Medi-Cal payment as payment-in-full, and will be subject to penalties if they require that patients pay anything beyond that amount. *See* Cal. Welf. & Inst. Code § 14019.4(a) & (c).

Before the various legislation leading to these civil actions, Medi-Cal payments per enrollee were

the nation's lowest for all enrollees. The Kaiser Family Foundation, *Medicaid Payments per Enrollee, FY2007*, http://www.statehealthfacts.org/comparetable.jsp?cat=4&ind=183. California's payments per enrollee in 2006 were less than 60% of the national average. *Ibid.* There had been no increase in most Medi-Cal payment rates since 2001. 09-958 Pet. App. 114a.

In 2008, the California Legislature enacted Assembly Bill X3 5 (AB 5). AB 5 added Section 14105.19 to the Welfare and Institutions Code, which instructed petitioner Director of the California Department of Health Care Services to cut rates under the Medi-Cal fee-for-service program to physicians, dentists, pharmacies, adult day health care centers, clinics, and other providers by ten percent. 2009-2010 Cal. Stat., 4th Ex. Sess., c. 5, § 36.[2]

Assembly Bill 1183 (AB 1183) superseded those cuts by adding a new Section 14105.191 that required a five-percent cut for certain Medi-Cal fee-for-service payments and benefits, including adult day health care centers and certain hospital services, and a one percent rate reduction for all other fee-for-service benefits (including hospital outpatient services).

---

[2] The Director (first Sandra Shewry, then David Maxwell-Jolly, now Toby Douglas) was sued by all respondents in the three certiorari petitions in which the Court granted review. Additional state officials were sued by only one set of plaintiffs in one of the other actions. Yet, for ease of reference, this brief generally refers to petitioners in the plural even when discussing solely the action brought by these respondents.

2008 Cal. Stat. c. 758, §§ 44, 45. Those cuts were repealed for a time in June 2011, but are now back in effect. 2011 Cal. Stat. c. 3, §§ 93.2, 93.5; 2011 Cal. Stat. c. 29, §§ 12, 13.

2. Although the AB 5 cuts were enacted in February 2008, with an effective date of July 1, 2008, California did not submit its proposed state plan amendments to HHS regarding any of the AB 5 cuts or most of the superseding AB 1183 cuts until September 30, 2008. 09-1158 Pet. 9.

On December 24, 2008, HHS requested that California provide additional information within 90 days, stating that the failure to do so could lead to disapproval. 09-1158 *California Pharmacists* Br. in Opp. 1a-20a. California did not respond. *Id.* at 23a. Twenty months after the State's response was due, HHS disapproved the state plan amendments. U.S. Cert. Amicus Br. 1a-4a.

Contrary to petitioners' claim (Pet. Br. 28), HHS did not rely on the existence of the injunctions as a basis for disapproving California's proposed amendments. Instead, HHS explained that it disapproved the proposed plan amendments because the State did not "provide information concerning the impact of the proposed reimbursement reductions on beneficiary access to services," "even though available national data indicate that this may be an issue for California," and did not respond to HHS's request for additional information. U.S. Cert. Amicus Br. 2a-3a.

HHS's additional ground for rejecting the plan amendments was based on the State's long delay in responding to HHS's request, not the existence of the injunctions. Petitioners' proposed amendments requested that the cuts, if approved, be effective retroactive to July 1, 2008. 09-958 Pet. App. 195a, 201a-202a. HHS explained that California's failure to respond raised concerns that "the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate access concerns." U.S. Cert. Amicus Br. 3a.

California has now sought reconsideration of that disapproval, U.S. Cert. Amicus Br. 5a-7a, which remains pending. Under 42 U.S.C. § 1316(c), HHS's decision to disapprove the proposed plan amendments are "not stayed pending reconsideration." Yet during this entire period—from the effective date of July 1, 2008, through the disapproval by HHS, and continuing to the present—petitioners have implemented the cuts, except when enjoined by federal courts.

C. Proceedings Below

1. No. 09-958

a. The original plaintiffs in the first action (the so-called *ILC* respondents) were Medi-Cal beneficiaries, associations composed of Medi-Cal beneficiaries, and pharmacies who served them. Additional plaintiffs (the intervenor respondents filing this brief) were permitted to intervene during the pendency of the case. Those intervenors are a physician, a dentist, a

medical clinic, and an adult day health care center also participating in the Medi-Cal program.[3]

The original plaintiffs sued petitioners in state court to prevent the implementation of AB 5. Petitioners removed the action from state to federal court. The district court denied the plaintiffs' motion for injunctive relief because Section 30(A) did not create any judicially enforceable "rights." The court of appeals reversed the district court and remanded for consideration of the merits of their motion for preliminary injunction. 09-958 Pet. App. 58a-93a. This Court denied petitioners' certiorari petition. *See* 129 S. Ct. 2828 (No. 08-1223).

b. On remand, the district court issued a preliminary injunction enjoining petitioners from implementing the AB 5 cuts with respect to doctors, dentists, prescription drugs, adult day health care centers, and clinics. 09-958 Pet. App. 94a-124a.

The district court found that respondents demonstrated a likelihood of success. 09-958 Pet. App. 100a-108a. The court found that the cuts would cause "pharmacies to cease selling [generic prescription] drugs to Medi-Cal patients and depriv[e] 'thousands, if not millions' of Medi-Cal beneficiaries of much-needed pharmaceuticals." *Id.* at 110a. It also found that pharmacies would "limit the scope of the

---

[3] Adult day health care centers provide an alternative to institutional care. Cal. Health & Safety Code § 1570.2.

services they provide to Medi-Cal beneficiaries, by, *inter alia*, discontinuing the provision of at least some prescription drugs * * *, turning away new Medi-Cal patients, or by laying-off pharmacy employees, and/or reducing pharmacy hours." *Id.* at 111a.

In addition, the court found that the rate reduction would cause doctors and other service providers (who had not received a rate increase since 2001) to "turn away" new Medi-Cal patients and either "stop treating [current] Medi-Cal patients, or, at a minimum, * * * reduce the services" provided to them. 09-958 Pet. App. 116a-117a. This reduction in services "increased the burden on emergency rooms and community health clinics" and forced some adult day health care centers to close. *Id.* at 117a-118a.

Weighing the balance of the hardships and the public interest, the district court concluded that the "significant threat to the health of Medi-Cal recipients" that "reducing payments to health-care service providers will likely cause" outweighed any expected fiscal savings. The district court noted such savings were unlikely to materialize because "many Medi-Cal beneficiaries will turn to more costly forms of medical care, such as emergency room care." 09-958 Pet. App. 121a-122a & n.14.

The district court issued a similar preliminary injunction for providers of non-emergency medical transportation services and providers of home health services in the Medi-Cal fee-for-service program. 09-958 Pet. App. 133a-153a. The district court found

that the cuts have "forced or will force [non-emergency medical transportation services] and home health services providers to reduce the geographic area they are able to serve, to decline to take new Medi-Cal patients, and, in some cases, to cease furnishing services to existing Medi-Cal patients" and to "close their business" altogether. *Id.* at 148a-149a. This curtailment of services had "already prevented altogether some Medi-Cal beneficiaries from obtaining needed [medical] services" and forced others to enter nursing homes. *Id.* at 150a-151a.

c. The court of appeals affirmed in part, reversed in part, and remanded. 09-958 Pet. App. 1a-38a, 54a-57a.

The court affirmed the district court's determination that respondents had established a likelihood of success on the merits on three independent grounds. 09-958 Pet. App. 10a-29a. First, "quite apart from any procedural requirements * * *, the State's decision to reduce Medi-Cal reimbursement rates based solely on state budgetary concerns violated federal law." *Id.* at 20a. Second, the court of appeals held that the rate cut was not the result of a "reasonable and sound" decision-making process and thus failed the interpretation of Section 30(A) urged by petitioners in that appeal. *Id.* at 22a n.12. Third, the court held that petitioners had not complied with the requirements of Section 30(A) as previously interpreted. *Id.* at 10a-12a (citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998)).

The court of appeals noted that "the cuts have apparently forced at least some providers to stop treating Medi-Cal beneficiaries." 09-958 Pet. App. 23a. In a separate unpublished opinion, the court of appeals also held that there was no clear error in the district court's conclusion "that the rate reductions would force—or, in some cases, were already forcing—[non-emergency medical transportation] and home health-care agencies to reduce the geographic area served, decline to take new Medi-Cal patients, or stop treating Medi-Cal patients altogether." *Id.* at 56a.

On respondents' cross-appeal, the court of appeals found that petitioners had waived their Eleventh Amendment immunity by removing the case from state to federal court. 09-958 Pet. App. 33a-37a. The court observed that California law creates a cause of action for mandamus which permits "monetary awards against a state agency or official resulting from unlawfully withheld health and welfare payments." *Id.* at 34a-35a (citing California cases). The court of appeals thus remanded with instructions that "the district court's injunction should extend to all services covered by that injunction and provided on or after" the cuts went into effect. *Id.* at 37a.

d. A month after the denial of petitioners' petition for rehearing en banc, petitioners asked the court to vacate its opinion and dismiss the appeals as moot because the challenged cuts of AB 5 were no longer in effect. The court of appeals rejected petitioners' motion. 09-958 Pet. App. 41a-51a. Petitioners have made all the required payments to respondents.

2. No. 09-1158

Meanwhile, the *California Pharmacists* respondents (including hospitals and adult day health care centers, associations representing those providers, and two individuals who receive Medi-Cal services) sued petitioners to prevent the implementation of AB 1183's five-percent/one-percent cuts.

a. The district court granted respondents' motion for a preliminary injunction as applied to adult day health care centers but not as to hospitals. 09-1158 Pet. App. 84a-105a. The district court found respondents had established irreparable injury to Medi-Cal beneficiaries due to the proposed cuts because they would be "at risk of losing access" to adult day health care services. *Id.* at 102a. That, in turn, created a "significant threat to the health of Medi-Cal recipients." *Id.* at 103a. The balance of hardships and public interest also weighed in favor of a preliminary injunction as to adult day health care centers, the district court found, because the proposed cuts might not save the State any money because "many Medi-Cal beneficiaries may turn to more costly forms of medical care, such as emergency room care." *Id.* at 103a n.7. The district court denied respondents' motion as applied to hospitals, however, on the ground that respondents had not established irreparable injury. *Id.* at 106a-127a.

b. The court of appeals affirmed the district court's entry of a preliminary injunction regarding the rate cut as applied to adult day health care

centers. 09-1158 Pet. App. 1a-36a. The court of appeals held that the district court did not commit clear error in finding that the legislature was concerned "solely with budgetary matters." *Id.* at 20a. Further, the court of appeals noted that petitioners "concede[ ] that here, the evidence indicates that at least some [providers] would stop treating beneficiaries due to AB 1183." *Id.* at 33a. The court of appeals reversed the district court's denial of a preliminary injunction regarding the cuts as applied to hospitals because the district court had abused its discretion in finding a lack of irreparable injury. *Id.* at 37a-41a.[4]

SUMMARY OF ARGUMENT

I.

A. Petitioners and their amici acknowledge that there is a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause. In this they are certainly correct. This Court has adjudicated on the merits dozens, and perhaps hundreds, of cases seeking injunctive relief against state officials based on the preemption of state laws by federal statutes.

To exclude the preemption suits here, petitioners improperly attempt to limit the scope of that equitable cause of action to suits brought in anticipation of

---

[4] The lower courts did not reach respondents' alternative argument that the rate cuts were prohibited because they were implemented without approval from HHS. *See* 09-1158 Pet. App. 120a n.9; 09-55365 Resp. C.A. Br. 39.

some coercive suit by the State. But this Court's past private suits seeking injunctions based on preemption of state laws have encompassed situations in which there was no potential state court litigation. And no sound reason justifies limiting the federal cause of action solely to anticipatory actions.

Petitioners' rigid rule would create a system where federal courts would be open only when state courts also would be available to resolve the federal question as a defense. Under their view, federal courts would not be open when there is no state court available to address the federal question. But when a state court is not available, the need for a federal judicial forum is even more critical. Petitioners would leave the federal judiciary, including this Court, completely unavailable to protect the federal-state balance.

B. Congress ratified this equitable cause of action by enacting the Three-Judge Court Act, the Johnson Act, and the Tax Injunction Act. These laws reflect Congress's general acceptance of a federal cause of action to enjoin state officials from implementing preempted state laws, save with regard to specific substantive areas.

C. Section 1983 does not preclude these suits. That statute was enacted in 1871 to expand access to federal courts, not to displace existing causes of actions. Section 1983 is broader in its remedies than the equitable cause of action, and this Court has interpreted the word "rights" in Section 1983 as a

limitation. But nothing suggests that Congress intended to limit a federal court's authority to stop state officials from implementing preempted state laws. An "injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 114 (1989) (Kennedy, J., dissenting).

D. Nor is the term "right" some talismanic, trans-substantive requirement that always must be satisfied to obtain relief in federal court. The statutory bases for the power of federal courts to enjoin state officials from implementing preempted state laws—the jurisdictional statutes and the authority to grant injunctions and writs—simply do not limit jurisdiction to those who can show the deprivation of a "right."

The implied cause of action cases, such as *Cort v. Ash*, 422 U.S. 66 (1975), usually involve a damages claim under a particular federal statute against *private* parties. Those cases do not implicate the federal-state balance and are not apposite because the Supremacy Clause governs directly only parties acting under color of law in their official capacities. Thus, a federal suit to enjoin implementation of preempted state laws runs only against parties like petitioners here.

II.

A. Medicaid, like other federal statutes enacted pursuant to the Spending Clause, preempts conflicting state laws. That such statutes ultimately involve a State's "voluntary agreement" to participate in the federal program does not alter their preemptive effect, just as it does not alter the status of similar Commerce Clause statutes. Indeed, federal laws would be continually frustrated if public entities that accepted federal money (or federal regulatory authority) could rely on state law as an excuse for not complying with federal law.

B. This Court has thrice rejected the argument that the structure of Medicaid (or similar Spending Clause statutes) reflects any congressional intent to preclude federal courts' authority to enjoin implementation of preempted state laws. Most importantly, nothing in the statute or regulations permits private parties to trigger an administrative review to ensure that a recipient complies with federal law. Thus, this case has none of the statutory protections for individuals that this Court found material in *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011).

Furthermore, the federal Department of Health and Human Services lacks effective tools to timely address rate cuts or other reductions in services. All HHS can do is threaten to withhold all federal funding from the Medi-Cal program. But even if it ultimately were to do so (perhaps many years after cuts were implemented), that would injure the very

beneficiaries the Medicaid program is designed to assist and protect. These cases are perfect examples of HHS's impotence. Petitioners implemented the proposed rate cuts months before they even submitted them to HHS for approval. And despite HHS's ultimate disapproval of the cuts (almost three years after they were enacted and more than two years after they were submitted for review), petitioners nevertheless continue to pay the unapproved lower rates to providers, except where federal courts have enjoined them from doing so.

C. Likewise, Congress did not preclude private enforcement of Section 30(A)'s preemptive effect. Section 30(A) has substantive content that is well within the judicial ken, and Congress expected private litigation over compliance with Section 30(A). Petitioners point to the repeal of the Boren Amendment. But when Congress repealed that provision, it refused to repeal Section 30(A) or to limit private enforcement of Medicaid.

III.

Petitioners concede that they waived any argument that respondent beneficiaries lack prudential standing. But they also waived the argument they belatedly press here as to respondent providers, as they did not press it in either the court of appeals or in their certiorari petitions.

In any event, respondents possess prudential standing. Just as a person has prudential standing to argue that "[t]he public policy of [a State], enacted in

its capacity as sovereign, has been displaced by that of the National Government," *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), a person has prudential standing to argue that a law enacted by a State has been displaced by the National Government.

Further, to the extent relevant, Section 30(A) itself was enacted to ensure that beneficiaries received medical services by creating sufficient incentives for doctors and other providers to offer services to Medicaid patients. As beneficiaries of medical services and the providers of those services, respondents have interests in the amount providers are paid that are, at the very least, arguably protected by the statute. Indeed, the facts of these cases show that the rate cuts would have a significant and immediate detrimental impact on both beneficiaries and providers.

ARGUMENT

The federal courts long have granted private persons injunctions and writs when government officials at the state and federal levels act outside the scope of their legitimate authority. The authority of such officials is limited not just by the prohibitions of the Constitution itself, but by all valid federal laws, which the Constitution provides "shall be the Supreme Law of the Land." U.S. Const. Art. VI, cl. 2. A state official who acts in violation of a federal statute is in the same position as a state official who acts in violation of the Constitution. Both have upset the "constitutional balance between the National Government and the States" established by the Supremacy

Clause. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

In both cases, the officials have exceeded their state authority and are stripped of any immunities. And in both cases, federal courts must be available to grant injunctions and writs to prevent irreparable injury to persons concretely injured by those violations. Such a cause of action exists apart from 42 U.S.C. § 1983 or any express or implied cause of action under a particular federal statute.

I. THE ACKNOWLEDGED AND LONGSTANDING EQUITABLE CAUSE OF ACTION TO KEEP GOVERNMENT OFFICIALS WITHIN THE SCOPE OF THEIR AUTHORITY INCLUDES SUITS BY INJURED INDIVIDUALS TO ENJOIN IMPLEMENTATION OF STATE LAWS THAT CONFLICT WITH FEDERAL LAW

Petitioners and their amici rightly acknowledge that there is a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause. Petitioners acknowledge that, even absent any express cause of action a person may be "a plaintiff in a lawsuit filed to forestall future state (or local) enforcement of state (or local) regulation of the party's conduct." Pet. Br. 43.

The United States as amicus likewise agrees that there is a "nonstatutory cause of action to enjoin enforcement of state action that is inconsistent with federal law." U.S. Br. 20. It describes this cause of

action as "well established," having "considerable historical grounding" and observes that it "serves an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 & n.7.

The National Governors Association also agrees that it is "now largely uncontroversial" that persons may "obtain relief in form of a writ of injunction or prohibition" from a federal court "against the enforcement of a pre-empted State law." NGA Br. 23-24.

They are all correct to acknowledge that this federal equitable cause of action exists, and yet they improperly attempt to limit its scope. To do so, they borrow from inapposite case law that is tied to particular statutory text and motivated primarily by concerns regarding damages relief that are inapplicable to this cause of action.

A. A Cause Of Action To Enjoin State Officials From Implementing Preempted State Laws Has Been Recognized By This Court For Almost Two Centuries

1. Individuals harmed by state officials' implementation of preempted state laws have a federal cause of action to enjoin such conduct

a. From its earliest era, this Court has held that a federal court that has subject-matter jurisdiction may grant an injunction or writ at the behest of an individual who has standing to bring a government official into compliance with federal law. *See Osborn v. Bank of the United States*, 22 U.S. 738

(1824). "The federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes * * * " *Swift & Co. v. Wickham*, 382 U.S. 111, 117 (1965). That practice increased after Congress gave federal courts arising-under-federal-law subject-matter jurisdiction in 1875. *See ibid.*

Ex parte Young, 209 U.S. 123 (1908), is a significant example of this cause of action. Contrary to petitioners' claim (Pet. Br. 41), that decision was not limited "only" to the question whether the Eleventh Amendment barred the grant of an injunction. In that case, complete diversity between the parties was lacking, *id.* at 143, and the Court thus also held that the federal courts had subject-matter jurisdiction to hear the claim under its federal-question jurisdiction. *Id.* at 145 ("We conclude that the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.").

Given the well-pleaded complaint rule and general rule that a "suit arises under the law that creates the cause of action," *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), this holding has been understood by leading judges and commentators alike as recognizing a federal cause of action to enjoin state officials who come into conflict with the Constitution or federal laws. *See, e.g.*, *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 332-334 (5th Cir. 2005) (Higginbotham,

J.); *Crawford-El v. Britton*, 93 F.3d 813, 831-832 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring), rev'd on other grounds, 523 U.S. 574 (1998); Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 903 (5th ed. 2003); 13D Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3566 (3d ed. 2008).

Indeed, this Court recently relied on *Ex parte Young* to rebut the United States's view that no cause of action existed to challenge federal legislation as unconstitutional under separation-of-powers principles. The Court held that equitable relief against both state *and* federal officials "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 n.2 (2010) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)); *see also Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995) (Alito, J.).

b. This cause of action against state officials includes enforcement of the Supremacy Clause's preemptive effect on state laws that conflict with federal laws. That is because, first, preemption claims are constitutional claims. *See Brown v. Hotel & Rest. Emps. Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (preemption occurs "by direct operation of the Supremacy Clause"); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271-272 (1977) (noting that preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause");

City of Phila. v. New Jersey, 430 U.S. 141, 142 (1977) ("federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause"); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution").

There is no basis why this constitutional claim "should be treated differently than every other constitutional claim" in terms of private enforcement. *Free Enterprise Fund*, 130 S. Ct. at 3151 n.2 (rejecting that argument as to separation-of-powers claim). To the contrary, the Supremacy Clause vindicates individual liberty through the so-called "vertical" separation of powers by limiting encroachment by the States on the national power and vice-versa. *See Bond*, 131 S. Ct. at 2364 (analogizing separation-of-powers and federalism principles). This Court thus recently confirmed that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Ibid.*

In addition, this Court already has permitted federal courts to exercise the same authority respondents invoke here to bring *federal* executive officials into compliance with federal law. Under the doctrine of "non-statutory review," this Court has recognized a federal equitable cause of action based on federal-question jurisdiction and the federal

courts' equity and writ authority. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 n.12 (1969-1970). Thus, even in the absence of an express cause of action or a statute like the Administrative Procedure Act (APA), if "an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *see also Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA"); *Harmon v. Brucker*, 355 U.S. 579, 581-582 (1958) ("[g]enerally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 142-143 (1967) (describing understanding of Congress in the 1930's regarding existence of "traditional channels of review" of federal executive action); Scalia, *supra*, at 913-916 (collecting cases in postal, public lands, and taxing areas).

For example, in *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the court of appeals examined the lawfulness of a federal Executive Order providing that federal contractors would be debarred from bidding on future government contracts if they permanently replaced striking workers. The plaintiffs claimed the Order was contrary to federal statutes. The court, through Judge Silberman, concluded

that the APA's statutory cause of action did not apply. It nonetheless held that as long as the federal court has subject-matter jurisdiction, "we have never held that a lack of a statutory cause of action is per se a bar to judicial review." *Id.* at 1328. *Accord Trudeau v. FTC*, 456 F.3d 178, 189-190 (D.C. Cir. 2006) (Garland, J.) ("'judicial review is available when an agency acts ultra vires,' even if a statutory cause of action is lacking").

Non-statutory review, like the equitable cause of action at issue in this case, reflects the undisputed role that federal courts have played, apart from any express cause of action, in ensuring that executive officials do not exceed the bounds of federal law.

c. Consonant with *Osborn*, *Ex parte Young*, and the non-statutory review cases, this Court has adjudicated on the merits dozens, and perhaps hundreds, of cases seeking injunctive relief against state officials based on the preemption of state laws by federal statutes. *See* Br. of *Dominguez* Resp. Appendix (listing such cases). To be sure, the Court's decisions generally were silent as to the cause of action. Even so, those decisions "have much weight, as they show that this point neither occurred to the bar or the bench." *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809) (Marshall, C.J.). And at least some members of this Court have opined that plaintiffs may "vindicate" some types of "preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State Transit*

Corp. v. City of Los Angeles, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting).

d. Moreover, this Court repeatedly has held that there is federal-question jurisdiction over suits brought against state officials seeking such injunctive relief. For example, in *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635 (2002), Verizon sought "relief from the [state] Commission's order 'on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail.'" *Id.* at 642 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)). This Court held that Verizon's claim "'thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.'" *Ibid.*

Although federal court jurisdiction can be established with only a colorable (as opposed to actual) federal cause of action, *see ibid.*, it would be quite surprising more than a century after *Ex parte Young* to discover that in fact there is no cause of action to adjudicate such preemption suits. That is why the United States in *Verizon* relied on *Shaw* to expressly urge that Verizon had "a claim for equitable relief under the Supremacy Clause and the federal jurisdictional statutes on the ground that an Act of Congress preempts a state regulatory action." U.S. Reply Br., *Verizon Md. Inc. v. Public Serv. Comm'n*, Nos. 00-1531, 00-1711, at 8 (Nov. 2001).

2. *The scope of the equitable cause of action includes all persons injured by preempted state laws, and is not limited to claims that merely raise defenses anticipatorily*

This federal equitable cause of action allows anyone harmed by implementation of a preempted state law to obtain injunctive relief. Petitioners thus are wrong to assert (Pet. Br. 43-44) that the federal equitable cause of action, which they ultimately acknowledge exists, is limited to suits brought in anticipation of some coercive suit by the State. But even if it were, this suit fits squarely in that model. California provides that those who participate in Medi-Cal will be penalized monetarily if they charge a patient any money other than the rate set by petitioners. *See* Cal. Welf. & Inst. Code § 14019.4(a) & (c); *see also id.* § 14123(a) (provider also may be suspended from Medi-Cal for violating any statutory provision). The validity of the rate set by petitioners (and whether that rate is preempted) thus could be addressed as part of an action the State could bring against the provider respondents.

In any event, the equitable cause of action is not so limited. One of petitioners' amicus asserts that "every case in which this Court has upheld relief based on federal supremacy" has met that requirement. NGA Br. 25. But as the United States noted at the certiorari stage, "not all of this Court's cases necessarily fit that description." U.S. Cert. Amicus Br. 18. To the contrary, this Court's cases also have

encompassed situations in which the State does not seek to regulate a party directly, but still acts with respect to that party in a way preempted by federal law.

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000), is one of those situations. In that case, the State maintained a list of companies with which it would not do business, including companies that did business with Burma. There was no formal process before a company was placed on the State's list; the only available challenge by a company to inclusion on the list was submission of an affidavit stating that it did no business in Burma. *Id.* at 368 n.2. There was no judicial or administrative action that the State could, or needed to, bring against the listed companies. This Court nonetheless permitted companies to bring a successful suit for injunctive relief claiming preemption of that state law.

Indeed, the United States pointed to *Crosby* in its certiorari-stage brief as evidence that the cause of action extended beyond anticipation of a coercive suit by the State. U.S. Cert. Amicus Br. 18. Now, however, it contends that the law in *Crosby* was an "exercise of the State's authority to impose and enforce what were essentially state regulatory standards." U.S. Br. 23 n.8. But the state law was only "regulatory" in the sense that it used the State's spending power, instead of its police power, to achieve its goals. The same is true here. California wants medical providers to provide services to people at a fixed price, so it allows participation in its Medi-Cal program only

to those who will accept the rates it pays and will not charge the patient any additional money.

Moreover, *Crosby* is hardly an outlier. This Court has addressed other preemption claims where the state law could not result in any form of judicial proceedings in which the plaintiff could raise preemption as a defense. *See Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (State refused to buy drugs from a company under Medicaid unless the company gave the State a rebate); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (State refused to pay for certain medical services required by Medicaid); *Perez v. Campbell*, 402 U.S. 637 (1971) (State automatically suspended driver's license of a person who failed to pay a judgment discharged under Bankruptcy Act); *see also Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (finding state regulation governing private parties' purchasing decisions preempted; leaving for remand the question whether state regulation governing its own purchase decisions also was preempted); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc.*, 519 U.S. 316 (1997) (after state agency ordered contractor to withhold certain payments from subcontractor, subcontractor sued state agency arguing that state agency's order to contractor was preempted by ERISA).

While these repeated decisions do not squarely hold that the federal equitable cause of action extends to these preemption suits, preemption suits of this

type are a consistent portion of the federal courts' docket. And this Court regularly reviews them without question. It would be surprising to learn that none of these cases should have been heard in federal court.

Petitioners' amici, who like petitioners admit such a federal cause of action exists, assert that the history of equity limits such actions to "negative injunctive relief" for those who have "a legal defense (such as pre-emption) to an impending legal action." NGA Br. 25-26. But the injunctions in these cases are negative injunctions—they simply prohibit the state officials from implementing a cut in existing rates. Further, equity causes of action were not limited solely to anticipatory legal defenses. *See* Br. of *Dominguez* Resp. 12-13, 40-42. And even if they had been, the "'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.'" *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010). There is no sound reason today to limit the federal cause of action solely to anticipatory actions. *Cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (determining whether an existing cause of action extends to certain conduct does not require the same inquiry as whether cause of action exists in first instance).

The rigid rule proposed by petitioners and their amici for cabining the existing cause of action is particularly unwarranted. They ask this Court to

create a system where federal courts would be open only when state courts would also be available to resolve the federal question as a defense. Under their view, however, federal courts would not be open when there is no state court available to address the federal question. But when a state court is not available, the need for a federal judicial forum is even more critical. Petitioners would leave the federal judiciary, including this Court, completely unavailable to protect the federal-state balance.

B. Congress Has Ratified The Existing Equitable Cause Of Action To Enjoin Conduct Implementing Preempted State Laws By Enacting Specific Federal Laws That Address It, Rather Than Abolish It

In light of a growing number of federal court challenges to state legislation, Congress considered at the beginning of the Twentieth Century a variety of responses to the authority of federal courts to enjoin state officials. Congress ultimately adopted two narrow approaches that signaled its general acceptance of the federal cause of action to enjoin state officials who were implementing state laws contrary to the Constitution and laws of the United States.

1. Shortly after this Court's decision in *Ex parte Young*, the House of Representatives passed a bill that would have amended what is now Section 1331 to deprive district courts of jurisdiction over actions "to suspend, enjoin, or restrain the action of any officer of a State in the enforcement, operation, or

execution of a statute of such State, upon the ground of the unconstitutionality of such statute." 46 Cong. Rec. 3998, 4001 (1911) (reprinting conference report).

The Conference Committee struck that provision, however, and substituted a provision requiring a three-judge court to convene to enter such an injunction and for an appeal to be available directly to this Court. *Id.* at 4001-4002. Congress enacted that substitute. *See* Judicial Code of 1911, ch. 231, § 266, 36 Stat. 1087, 1162 (codified as amended at 28 U.S.C. § 2281 before its repeal by Pub. L. No. 94-381, § 1, 90 Stat. 1119, 1119 (1976)). That statute reflected Congress's judgment that although federal courts should have the power to enjoin state officials from implementing state statutes, the decision should not rest in the hand of a single district court judge. *See Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 77 (1960) (describing three-judge court provision as "cushioning the impact of the *Young* case").

For the first 15 years after its enactment, in about 10% of the cases heard by this Court under this provision, the "state regulation was alleged to be precluded by or to conflict with some existing and controlling federal law." Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 Harv. L. Rev. 623, 632 & n.41 (1927-1928); *see also Michigan Cent. R.R. v. Michigan Pub. Util. Comm'n*, 271 F. 319 (E.D. Mich. 1921) (three-judge court) (holding Supremacy Clause claim triggered requirement for three-judge court). Justice Frankfurter, writing for the Court, held that "[n]either the language of

§ 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 156 (1962).

Although this Court in 1965 ultimately reversed course and held that the three-judge court provisions did not apply to Supremacy Clause challenges, *see Swift & Co. v. Wickham*, 382 U.S. 111 (1965), it did so with heavy reliance on judicial administration (i.e., concern regarding numerous three-judge court actions with mandatory appeal to this Court). *Id.* at 128-129. No suggestion was made that Congress was not aware of preemption challenges when it enacted the three-judge court provisions or that it disapproved of them in any way. Instead, this Court concluded that actions claiming preemption would not have been as troubling to Congress as substantive due process cases. That was so, the Court reasoned, because "single-judge decisions in conflict and preemption cases were always subject to the corrective power of Congress." *Id.* at 127.

2. After several years of experience with the three-judge court provision, some members of Congress renewed efforts to establish broad limits on federal court jurisdiction over injunctive suits against state officials. *See* Note, *Limitation of the Jurisdiction of the Federal District Courts in Public Utility Rate Litigation*, 20 Iowa L. Rev. 128, 133 (1934-1935) (collecting proposed bills). Instead of removing such

jurisdiction generally, however, Congress channeled the power of the federal courts to enjoin state officials with regard to certain substantive areas. In doing so, it reaffirmed the availability of the equitable cause of action in all other areas.

The Johnson Act of 1934, ch. 283, § 1, 48 Stat. 775 (codified at 28 U.S.C. § 1342), for example, expressly carved out actions claiming preemption from its exclusion of federal court jurisdiction. That statute provides that a district court "shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency" so long as a "plain, speedy and efficient remedy may be had in the court of such State." Additional language in the Johnson Act excludes preemption claims from its scope, however, by exempting orders that "interfere with interstate commerce." *See Public Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469-470 (1943) (holding that the Johnson Act did not bar federal injunction against preempted state order). Thus, the Johnson Act continues to permit preemption claims to be brought in federal court even though other federal constitutional claims are channeled to state court. *See Freehold Cogeneration Assocs., L.P. v. Board of Regulatory Comm'rs*, 44 F.3d 1178, 1186 (3d Cir.) (collecting modern cases), cert. denied, 516 U.S. 815 (1996).

The fine-tuned language in the Johnson Act contrasts with the Tax Injunction Act (TIA), enacted three years later. *See* Act of Aug. 21, 1937, ch. 726,

§ 1, 50 Stat. 738 (codified at 28 U.S.C. § 1341). "The language of the TIA differs significantly from that of the Johnson Act." *Hibbs v. Winn*, 542 U.S. 88, 105 n.7 (2004). Unlike the Johnson Act, Congress provided no exceptions in the TIA to a broad divestiture of district court jurisdiction regarding tax collection in deference to state courts. This broader language made clear that Congress did not intend to permit federal courts to entertain preemption claims regarding state taxes so long as there was "a plain, speedy and efficient remedy" in state courts. *See Ashton v. Cory*, 780 F.2d 816, 821-824 (9th Cir. 1986) (Kennedy, J.).

Thus, although Congress's approach to federal jurisdiction varied on certain occasions for certain types of claims, the various statutes together reflect Congress's general acceptance of a cause of action to enjoin state officials from implementing preempted state laws in those circumstances where it did not expressly remove federal court jurisdiction.

C. Section 1983 Was Not Intended To Limit This Distinct Cause Of Action

Petitioners rely heavily on the case law developed by this Court under 42 U.S.C. § 1983, and argue that the rules adopted by this Court to determine whether a statute secures "rights" should dictate the limits of a federal court's authority to stop state officials from implementing preempted state laws. Pet. Br. 21-23. But nothing suggests that Congress intended those limits to be imported into this distinct cause of action. "Despite what one might think from

the increase of litigation under the statute in recent years, § 1983 does not provide the exclusive relief that the federal courts have to offer." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting).

a. In the last quarter of the Nineteenth Century, this Court recognized that the two causes of action were distinct and that just because an action could not be brought under Section 1983 did not exclude all federal relief. Thus, even though the Court held in *Carter v. Greenhow*, 114 U.S. 317 (1885), that the Contracts Clause did not secure rights enforceable through Section 1983, it noted that Congress "has legislated in aid of the rights secured by that clause of the Constitution * * * by conferring jurisdiction upon the [lower federal] courts * * * of all cases arising under the constitution and laws of the United States, where the sum or value in dispute exceeds $500." *Id.* at 322-323. And on the same day, it expressly permitted a case under the Contracts Clause to proceed under the arising-under-federal-law statute. *See White v. Greenhow*, 114 U.S. 307, 308 (1885).

This Court later explained that even though a suit could not be brought under Section 1983, "[i]f state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws * * * remedies are found in [the predecessor to Section 1331], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States." *Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900). Although the statutory provision cited by the

Court was a jurisdictional one, the *Holt* Court understood such a jurisdictional grant to confer the equitable power to enjoin government officials from exceeding their lawful authority. *Holt* was issued at the same time *Ex parte Young* and non-statutory review cases were cementing into the case law that already-longstanding equitable cause of action.

b. These holdings are consistent with the purposes underlying Section 1983. Section 1983 was enacted in 1871 to expand access to federal courts, not to displace existing causes of actions. Indeed, the legislative history reflects that Congress intended Section 1983 to go beyond the cause of action already available under the "power-allocating provisions" of the Constitution. *Dennis v. Higgins*, 498 U.S. 439, 455 (1991) (Kennedy, J., dissenting).

Thus one of the bill's sponsors, Representative Shellabarger, explained that existing, pre-Fourteenth Amendment constitutional "prohibitions upon the [police] powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers." *Ibid.* (quoting Cong. Globe, 42d Cong., 1st Sess., App. 69-70 (1871)). Similarly, Senator Thurman, an opponent of the bill, explained that "in respect to this class of provisions, which are limitations upon the powers of the States," they already were "protected through the Federal judiciary." Cong. Globe, 42d Cong., 1st Sess., App. 221 (1871).

c. Section 1983's remedies are much broader than those available under this federal equitable cause of action. Section 1983 authorizes damages (including punitive damages) against officials in their individual capacities. *See Smith v. Wade*, 461 U.S. 30 (1983). In addition, federal courts have broader injunctive authority under Section 1983 than under other causes of action because Section 1983 is an express exception to the Anti-Injunction Act's prohibition against enjoining state court proceedings. *See Mitchum v. Foster*, 407 U.S. 225 (1972). And (since 1976), prevailing plaintiffs can recover attorneys' fees against officials in both their individual and official capacities. 42 U.S.C. § 1988(b); *Hutto v. Finney*, 437 U.S. 678 (1978).

Section 1983 also, for a substantial period of time, provided for broader jurisdiction for federal courts than was otherwise generally available to seek injunctive relief against state officials. Congress granted federal courts jurisdiction over Section 1983 actions without regard to the amount in controversy. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). At the time of Section 1983's enactment, federal courts did not possess general arising-under-federal-law jurisdiction. Even when Section 1331's predecessor authorized general federal question jurisdiction, it contained an amount-in-controversy requirement (equal to that of diversity) until 1980. *See Hart and Wechsler's, supra*, 1473. That amount was "impossible to meet" for many beneficiaries challenging state welfare laws as preempted.

Hagans, 415 U.S. at 552-553 (Rehnquist, J., dissenting). That jurisdictional barrier was one of several reasons litigants sought to have their claims fit within the scope of Section 1983, rather than simply press them under the equitable cause of action.

Thus, given their distinct histories and distinct remedies, there is no reason to think that Congress intended Section 1983 to limit the equitable cause of action invoked by respondents here. Instead, this cause of action is a longstanding, albeit bare bones, action needed to ensure that persons can seek injunctive relief in federal court to prohibit injuries caused by state efforts to enforce preempted state laws. "The injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Golden State*, 493 U.S. at 114 (Kennedy, J., dissenting).

D. Respondents Do Not Need A "Right" In Order To Fall Within The Existing Equitable Cause Of Action

Contrary to petitioners' view (Pet. Br. 22-26, 41-43), the term "right" is not some talismanic, transsubstantive requirement that always must be satisfied to obtain relief in federal court. This Court has held that the word "rights" in Section 1983 is a term of limitation in that particular statute. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("it is only violations of *rights*, not laws, which give rise to § 1983 actions"). By contrast, Section 1331 and the other

statutory bases for the federal courts' power to enjoin state officials from implementing preempted state laws simply "do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting).

Further, the Court has held in *Gonzaga*, 536 U.S. at 283, that "the determination of whether a statute confers rights enforceable under § 1983" should be "guide[d]" by the Court's "implied right of action cases" such as *Cort v. Ash*, 422 U.S. 66 (1975). Those cases also require the existence of a "right." But they usually involve a damages claim under a particular federal statute against *private* parties. *See* Br. of *Dominguez* Resp. 35-36 n.17. This case does not involve private defendants.[5]

The Supremacy Clause, by contrast, directly governs only parties acting under color of law. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229 (1983). Likewise, the federal equitable

[5] On occasion, the implied private cause of action analysis has been applied to suits brought against government officials. *See Alexander v. Sandoval*, 532 U.S. 275 (2001); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In those cases, the federal statute imposed identical duties on recipients of federal funds regardless of whether they were private persons or persons acting under color of law, so the Court's conclusion also decided whether the statute created an implied right of action against private defendants.

cause of action to enjoin implementation of pre-empted state laws runs only against persons acting under color of law. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 58 (1st Cir. 2005) (collecting cases); 13D Wright & Miller, *supra* § 3566, at 292 n.70. It is this public-private distinction that has caused the Court consistently to hold that (1) federal courts possess federal-question jurisdiction over preemption claims brought by a private party against a person acting under color of law in his official capacity, *see Verizon*, 535 U.S. at 642; *Ex parte Young*, 209 U.S. at 145; but (2) federal courts do not possess federal-question jurisdiction over preemption claims brought by one private party against another, *see Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

Nor is this a case like *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011), another case against private defendants. There, plaintiffs were attempting to clothe an implied cause of action under the statute as a contract action. This Court rejected that effort because the contracts at issue "simply incorporate statutory obligations" and thus plaintiffs' suit to enforce the contracts against private parties was "in essence a suit to enforce the statute itself." 131 S. Ct. at 1343. By contrast, the "essence" of this suit is *not* to enforce Section 30(A), but to enforce the Supremacy Clause—which bars state officials from implementing any preempted state law.

Moreover, there is a particular irony in petitioners' heavy reliance on *Astra*. The defendants in *Astra* insisted that the contract cause of action was inappropriate because the contract simply incorporated the terms of a Spending Clause statute. Yet here, where respondents seek to enforce the preemptive effect of the federal law, petitioners claim that the federal law is merely a "State's contract with the federal government." Pet. Br. 47.

II. Congress In The Medicaid Act Did Not Preclude Reliance On The Existing Cause Of Action To Enforce The Supremacy Clause

A. Medicaid, Like Other Statutes Enacted Pursuant To The Spending Clause, Is Federal Law And Preempts Contrary State Law Pursuant To The Supremacy Clause

1. Petitioners suggest (Pet. Br. 46-49) that requirements in Spending Clause statutes should be subject to a different Supremacy Clause analysis. But it is settled that federal statutes enacted pursuant to the Spending Clause do preempt.

The cases are legion. For example, a State is preempted from interfering with a recipient's use of federal funds in the manner prescribed by Congress. *See, e.g., Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258, 269-270 (1985) (holding that state statute governing locality's use of funds "is invalid under the Supremacy Clause" as applied to

federal funds given to locality with intent of vesting it with discretion); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (state statute allowing the State to attach Social Security benefits conflicted with the Social Security Act and was therefore preempted by operation of the Supremacy Clause); *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413, 417 (1973) ("[b]y reason of the Supremacy Clause," funds derived from Social Security disability benefits are immune from state debt-collection processes even though in private hands). Thus, as the United States explains, "[t]he Act of Congress establishing the joint federal-state program * * * remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause." U.S. Amicus Br. 27 n.11.

That preemptive authority applies equally when the State is the recipient of federal funds and disobeys the federal law governing the use of those funds. This Court has so held for more than 40 years. *See* Br. of *Dominguez* Resp. 21-22 n.10. The United States consistently has embraced these holdings. *See* U.S. Amicus Br., *Gonzaga Univ. v. Doe*, No. 01-679, at 18-19 (Feb. 2002); U.S. Br. in Opp., *Haveman v. Westside Mothers*, No. 02-277, at 6-10 (Oct. 2002); U.S. Amicus Br., *Lapides v. Board of Regents of Univ. of Ga. Sys.*, No. 01-298, at 13 (Dec. 2001).

If the Supremacy Clause did not apply in these situations, there would be no justification (in light of the Eleventh Amendment) for permitting suits in federal court against state officials. *See Pennhurst*

State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (Eleventh Amendment bars federal court from adjudicating suits for violations of state law against state officials when federal interest in vindicating Supremacy Clause is lacking). But this Court repeatedly has held that suits to enforce Spending Clause statutes against state officials who are recipients of federal financial assistance are not barred by the Eleventh Amendment. *See, e.g.*, *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (Developmental Disabilities Act); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004) (Medicaid Act); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Aid to the Aged, Blind, and Disabled Act).

2. That Medicaid ultimately involves a State's "voluntary agreement" to participate in the federal program by accepting federal funds does not alter its status as supreme federal law.

Congress has created similar voluntary programs under its Commerce Clause authority, where it offers the State the power to regulate industries consistent with federal law or to abandon the field. *See New York v. United States*, 505 U.S. 144, 167 (1992); *see also FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act of 1978); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act of 1977). This Court in *New York* explained that this type of Commerce Clause statute is the same as a Spending Clause statute because "the residents of the State retain the ultimate decision as to whether or

not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." 505 U.S. at 168.

These conditional federal laws are not considered to be any less supreme over state law. *See Verizon*, 535 U.S. 635 (adjudicating preemption claims under the Telecommunications Act of 1996, which permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, 47 U.S.C. § 252(e)(5)). Yet if petitioners' theory about "voluntary" programs were correct, it would follow that these federal laws likewise were not supreme.

Furthermore, drawing a line between Spending Clause statutes and other statutes is not workable. Statutes are not always an exercise of a single power. For example, the federal Solomon Amendment required universities that received federal funds to permit access to military recruiters. While that unquestionably was an exercise of Congress's Spending Power, this Court sustained it as an exercise of Congress's War Power. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Likewise, a federal statute that prohibited state courts from admitting in civil trials documents

that local governments had created in order to receive certain federal funds was sustained as an exercise of Congress's Commerce Clause power. *See Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129 (2003).

B. In Medicaid, Congress Did Not Create Any Centralized Oversight Scheme That Displaced The Federal Courts' Authority To Enjoin Implementation Of Preempted State Laws

1. Petitioners posit (Pet. Br. 26-27) that Congress decided to "centralize" Medicaid enforcement in HHS. At least three times, however, this Court has addressed and rejected a similar argument.

In *Rosado v. Wyman*, addressing another provision of the Social Security Act, the Court explained that it had "considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of [Health, Education, and Welfare (HEW)] the power to cut off federal funds for noncompliance with statutory requirements." 397 U.S. 397, 420 (1970). In an action under Section 1983, moreover, this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), again held that the Medicaid administrative oversight mechanism available here—review and approval of state-submitted plans, with withdrawal of funds for noncompliance—did not "evidence[ ] an intent to foreclose a private remedy in the federal courts." *Id.* at 523.

Most recently in *Stewart*, involving another Spending Clause statute, this Court held:

> The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has "displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young*."

131 S. Ct. at 1639 (quoting *Verizon*, 535 U.S. at 647 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 75 (1996))).

2. Although this Court in *Gonzaga* relied on the notion of "centralized review" as a ground not to find an enforceable "right," it did so based on a special statutory provision that prohibited the agency from carrying out the enforcement "in any of the regional offices." 536 U.S. at 290 (quoting 20 U.S.C. § 1232g(g)). This Court reasoned that the same Congress that added the centralization provision "due to 'concern that regionalizing the enforcement of [the statute] may lead to multiple interpretations of it' " would not have "intended private suits to be brought before thousands of federal- and state-court judges." *Ibid.*

Medicaid has no such provision. To the contrary, HHS delegates authority to approve plans and plan amendments to its regional offices. *See* 42 C.F.R. § 430.15(b). Those offices are not in fact uniform in

their practices or interpretations. *See* United States Government Accountability Office, *Medicaid Managed Care: CMS's Oversight of States' Rate Setting Needs Improvement*, GAO-10-810 (2010). Furthermore, petitioners' argument cannot be reconciled with their acknowledgements that many parts of Medicaid can be privately enforced. Pet. Br. 42-43, 46-47 n.17. A statute that intended only centralized enforcement would not permit any such suits.

Petitioners note that the Medicaid regulations contemplate that private persons or entities may participate as amicus or parties in administrative hearings. Pet. Br. 7-8. But an administrative hearing can only be triggered if HHS *disapproves* a state plan amendment or *disallows* particular state spending and then the State subsequently challenges HHS's action. Thus, if the regional office approves a state plan amendment (or simply does not act within the 90-day period, *see* 42 U.S.C. § 1396n(f)(2)), there is no hearing in which to participate.

Even in those small subset of cases in which HHS disapproves a state plan amendment and there is an administrative hearing, the regulations allow participation by private persons or entities as parties only "if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." 42 C.F.R. § 430.76(b). Petitioners, of course, claim (Pet. Br. 52 & n.20) that both providers and beneficiaries fall outside this regulation. Thus, despite their pointing to the regulations,

petitioners would offer respondents no forum where they would have an opportunity to be heard or to appeal to court.

And nothing in the statute or regulations permits private parties to trigger an administrative hearing. Thus, this case has none of the statutory protections that this Court found material in *Astra*, where federal law required HHS to develop a "formal dispute resolution procedure," ultimately resulting in federal court review under the APA, to resolve claims by entities that provide medical care for the poor. 131 S. Ct. at 1350.

3. Furthermore, apart from the barriers to private participation, HHS itself does not have effective tools to address rate cuts or other reduction in services. HHS's primary enforcement mechanism is the threat that it will not pay the federal matching share for state spending that does not comply with the Act. That threat has some efficacy when the State's violation is paying too much to providers (or providing services falling outside the scope of Medicaid). HHS simply does not pay the difference between the lower rate the State should have paid and the higher rate it did pay (or HHS refuses to pay for uncovered services). But when, as here, the State *cuts* the rates it pays to providers, there are no discrete payments for HHS to withhold; HHS instead would have to threaten to withdraw federal funding for the State's entire Medicaid program, which has never occurred.

HHS thus possesses no means of ensuring that States will not illegally cut rates. These cases are perfect examples of HHS's impotence. Petitioners implemented the proposed rate cuts months before they even submitted them to HHS for approval. And despite that HHS *disapproved* the cuts (almost two years after they were submitted), petitioners still are paying the disapproved rates except where federal courts have enjoined them from doing so.

A similar situation recently has arisen in Indiana, where the State enacted a law disqualifying a particular provider from receiving Medicaid payments. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, No. 1:11-CV-630, 2011 WL 2532921 (S.D. Ind. June 24, 2011). HHS disapproved the State's plan amendment, *id.* at *10, but the State indicated its intention to enforce the disqualification anyway. HHS's only response was to file an *amicus* brief supporting the provider's private federal suit. Absent a court injunction, Medicaid beneficiaries would have been denied access to certain medical services and the providers would have suffered substantial monetary damages (resulting in lay-offs of employees and closing health centers statewide). *Id.* at *17. There is no evidence that Congress intended such a provider to have no access to federal court in that situation. As the United States itself explained at the certiorari stage, a "system that relies solely on agency review may often be less effective in ensuring the supremacy of federal

law than a system of agency review supplemented by private enforcement." U.S. Cert. Amicus Br. 19.

4. Two other statutes amending Medicaid also reflect Congress's intent that providers should be able to enforce Medicaid provisions, and not just through Section 1983.

First, Congress amended the Medicaid Act in 1975 to provide that any State that did not waive its Eleventh Amendment immunity for "any suit brought against the State or a State officer by or on behalf of any provider of services * * * with respect to the application of [Section 13(D), requiring reasonable rates of reimbursement]" would lose 10% of its Medicaid funds. Pub. L. No. 94-182, § 111(a), 89 Stat. 1051, 1054 (1975).

That amendment appears to respond, in part, to the holding of *Edelman v. Jordan*, 415 U.S. 651 (1974). *Edelman* held that the Eleventh Amendment barred federal courts from awarding retroactive money damages for violations of federal welfare law. Congress enacted the waiver condition because States were "chang[ing] their reimbursement system without receiving HEW approval" and "providers feared that HEW would be slow to determine if State action was legal, and to bring a conformity hearing to cut off Federal funds if they did find the State out of compliance." H.R. Rep. No. 94-1122, at 4 (1976). Congress was concerned that, in the interim, the "State-devised changes in hospital reimbursement would result in a loss of funds" to providers. *Ibid.* The legislative

history noted that although "the providers could sue the State to enjoin action," no retroactive relief would be available absent the waiver. *Ibid.*

Congress repealed this waiver provision in 1976. Pub. L. No. 94-552, 90 Stat. 2540 (1976). The legislative history made clear, however, that Congress did not intend that repeal to "be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive [relief] in a federal or state judicial forum." S. Rep. No. 94-1240, at 4 (1976). Likewise, HEW stated that "providers can continue, of course, to institute suit for injunctive relief in State or Federal courts, as necessary." H.R. Rep. No. 94-1122, at 7. As this Court concluded, this provision shows that "Congress intended that health care providers be able to sue in federal court for injunctive relief." *Wilder*, 496 U.S. at 516.

Notably, Congress did not limit the waiver, while it was in effect, to Section 1983 suits, but applied it to "any suit." That is relevant because at the time Congress enacted and then repealed this statute, it was not clear whether Section 1983 could be used to enforce rights secured by Medicaid. Although *Edelman* was later characterized in *Maine v. Thiboutot*, 448 U.S. 1 (1980), as a suit under Section 1983, this Court had at the time left open the question what statutes could be enforced through Section 1983, *see Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974), and

lower courts and commentators were divided, *see Thiboutot*, 448 U.S. at 29-30 (Powell, J., dissenting).

Two other statutes likewise contemplate that private suits to ensure compliance with Medicaid are not limited to Section 1983. In response to *Suter v. Artist M.*, 503 U.S. 347 (1992), Congress enacted two provisions in 1994 that stated that Medicaid and other provisions of the Social Security Act were not "unenforceable" by private parties simply because the provisions sought to be enforced were identified as components of a state plan. In doing so, Congress again referred expansively to "private actions" brought "to enforce a provision" of the Social Security Act, rather than merely to Section 1983. Pub. L. No. 103-382, § 555, 108 Stat. 3518, 4057 (1994) (codified at 42 U.S.C. § 1320a-2); Pub. L. No. 103-432, § 211, 108 Stat. 4398, 4460 (1994) (codified at 42 U.S.C. § 1320a-10).

C. Congress Did Not Preclude Private Enforcement Of Section 30(A)'s Preemptive Effect

Petitioners seek to characterize Section 30(A) as so amorphous that it has no content to which the Supremacy Clause can attach. Pet. Br. 26, 29-30. But this Court did not grant petitioners' second question presented, which sought review of the meaning of Section 30(A). Given that denial of review, the only question before the Court is whether medical providers and beneficiaries can obtain an injunction to enjoin enforcement of a state law that

conflicts with Section 30(A). In any event, Section 30(A) has substantive content that is well within the judicial ken, and Congress expected private litigation over compliance with Section 30(A).

1. Section 30(A) contains judicially enforceable standards that preempt contrary state laws

Congress first enacted Section 30(A) in 1968. At that time, as petitioners note (Pet. Br. 29-30), it apparently was intended solely as a ceiling on payments. That is, it required state plans to provide for methods and procedures necessary to ensure that "payments * * * are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." Pub. L. No. 90-248, § 237, 81 Stat. 821, 911 (1968).

In 1981, however, Congress removed the "in excess of reasonable charges" language from 30(A), so that the provision required that state plans provide for methods and procedures necessary to ensure that "payments are consistent with efficiency, economy, and quality of care." Pub. L. No. 97-35, § 2174(a), 95 Stat. 357, 809 (1981). The legislative history accompanying the 1981 act indicates that Congress intended the federal courts to be open to suits by beneficiaries or providers:

> The Committee wishes to emphasize that States must continue to operate their programs in conformity with approved State plans. Plan changes that would affect the

> rights of Medicaid beneficiaries or participating providers would be subject to approval of the Secretary, who must confirm that the State's program will continue to be operated in a lawful manner. *Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action.*

H.R. Rep. No. 97-158, Vol. II, at 301 (1981) (emphasis added).

When Congress next amended Section 30(A) in 1989, it did so to add the requirement that state plans provide for methods and procedures necessary to ensure that payments "are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260 (1989). In the public law, Congress entitled this amendment: "Codification of adequate payment level provisions." *Ibid.*

The legislative history confirms that Congress added this requirement (which previously existed as an agency regulation) due to concern that beneficiaries were not receiving covered services because physician participation in the Medicaid programs was too low, particularly with respect to obstetricians. H.R. Rep. No. 101-247, at 389-390 (1989). Congress attributed that low participation rate, in turn, to States' failure to maintain adequate provider reimbursement

levels. *Ibid.* In particular, Congress understood that Medicaid expansions also included in the Act "will not have their intended effect if physicians are not willing to treat Medicaid patients." *Id.* at 390. And Congress explained that, "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the program." *Ibid.*

Not surprisingly, then, petitioners conceded in their petitions and in other litigation that Section 30(A) imposes a substantive standard regarding the level of payments. 09-958 Pet. 26, 33 (Section 30(A) "sets some substantive objecti[ves]," including that the rates cannot be so low "as to create an access or quality of care problem for beneficiaries"); 09-1158 Pet. 31; *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1498 (9th Cir. 1997) ("the Department admitted that the access requirement serves to mandate a minimum payment standard"), cert. denied, 522 U.S. 1044 (1998).

HHS likewise has viewed Section 30(A) as capable of application. It has relied on Section 30(A) to disapprove proposed state rate decreases. *See, e.g.*, 57 Fed. Reg. 917, 918 (Jan. 9, 1992) (disapproving proposed state rate cut because HHS "believes that a forty percent reduction in the State's payment level for physician services would not meet the statutory requirements of section 1902(A)(30) of the Act"). Indeed, every court that addressed the issue prior to *Gonzaga* expressly found Section 30(A) capable of judicial enforcement. *See, e.g., Orthopaedic,* 103 F.3d at 1495-1496; *Visiting Nurse Ass'n of N. Shore, Inc. v.*

Bullen, 93 F.3d 997, 1004 (1st Cir. 1996), cert. denied, 519 U.S. 1114 (1997); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1028-1029 (7th Cir. 1996); *Arkansas Med. Soc'y Inc. v. Reynolds*, 6 F.3d 519, 523-528 (8th Cir. 1993).

2. *Congress intentionally preserved private enforcement of Section 30(A) even while eliminating the Boren Amendment*

Petitioners point (Pet. Br. 31-33) to Congress's decision in 1997 to repeal the Medicaid Act's Boren Amendment, as well as one sentence in an associated committee report (Pet. Br. 32), to argue that Congress did not want Section 30(A) privately enforced by providers. Of course, the question here is not private enforcement of Section 30(A) alone, but of its preemptive effect through the Supremacy Clause. In any event, petitioners' argument fails on its own terms.

Before 1997, this Court had held in *Wilder* that a different provision of the Medicaid Act, known as the Boren Amendment, could be enforced through Section 1983. At that time, the lower courts were in agreement that Section 30(A) also was privately enforceable through Section 1983. *See*, *supra*, pages 56-57.

In 1997, the National Governors Association urged Congress to repeal both the Boren Amendment and "Boren-like language [in the Medicaid Act] that has exposed states to lawsuits driving up rates for services." *Governors' Perspective on Medicaid*: Hearing Before the S. Comm. on Finance, 105th Cong. 44

(1997). In describing the "Boren-like" provisions, the Governors specifically cited Section 30(A) as one of those provisions, and discussed the then-recent decision in the *Orthopaedic* case out of California. *Ibid.* While Congress did repeal the Boren Amendment, it did not adopt that broader recommendation. Thus, petitioners' reliance on a snippet from a 1997 committee report that described the repeal of the Boren Amendment as precluding enforcement by providers of "any other" provision of Section 1396a, H.R. Rep. No. 105-149, at 591 (1997), does not alter the fact that the text of Section 30(A) was not amended in 1997.[6]

Moreover, other contemporaneous efforts to limit private enforcement of Medicaid also failed. Congress declined to enact proposed bills, reported out of the relevant House and Senate committees in 1996, that expressly would have barred all beneficiary or provider lawsuits in federal court. *See, e.g.*, H.R. Rep. No. 104-651, at 356 (1996) (discussing H.R. 3734, 104th Cong. § 1508(a) (1996), which would have provided that, except for actions by HHS, "no person or entity may bring an action against a State in Federal court based on its failure to comply with any requirement of this title"); S. 1956, 104th Cong.

---

[6] Nor did Congress eliminate federal district court jurisdiction over claims involving Medicaid, as it did in the Johnson Act, the Tax Injunction Act, and portions of the Medicare Act, *see Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000); 42 U.S.C. § 1395ww(d)(7).

§ 1508 (1996) (same). And the President vetoed a bill that would have converted Medicaid into a block-grant program and would have abrogated any pending cause of action "which seeks to require a State to establish or maintain minimum payment rates under [Medicaid] or claim which seeks reimbursement for any period before the date of the enactment of this Act based on the alleged failure of the State to comply with [Medicaid]." H.R. 2491, 104th Cong. § 7002(b)(4) (1995); *see also* H.R. Rep. No. 104-350, at 1069 (1995) (Conf. Rep.) ("The bill would remove the existing right for an applicant, beneficiary, provider or health plan to sue a State official under 42 U.S.C. §1983 to require prospective enforcement of the Medicaid statute.").

III. Petitioners' Invocation Of Prudential Standing Is Misplaced And Waived

At the end of their brief, petitioners for the first time suggest that this Court should address questions of "prudential standing." Pet. Br. 49-52. That belated suggestion is both waived and without merit.

A. The claim that respondents lack prudential standing to pursue these actions does not implicate the Court's subject-matter jurisdiction and thus is waivable. *See Craig v. Boren*, 429 U.S. 190, 193-194 (1976). Petitioners waived that argument in these cases by not pressing it in either the court of appeals or in their certiorari petitions.

In neither appeal did petitioners press a zone-of-interests analysis in the court of appeals. In No. 09-958, the court of appeals expressly determined in the

first appeal that petitioners had waived the question of prudential standing by "failing to articulate any argument challenging [respondents'] prudential standing." 09-958 Pet. App. 90a n.17. In the appeal following remand, petitioners accepted that they had waived the issue in the first appeal. 09-55692 Pet. C.A. Br. 32-33. In *California Pharmacists* litigation at issue in No. 09-1158, petitioners did not raise prudential standing in the court of appeals in their "Statement of the Issues," and simply dropped a footnote asserting that respondents lacked prudential standing because they "have no rights under the federal law they seek to enforce." 09-55532 Pet. C.A. Br. 22-23 n.10.

And, as petitioners admit (Pet. Br. 52 n.20), in neither case did they argue that the respondent beneficiaries (as opposed to providers) were not within the zone of interests.

In this Court, standing is not mentioned in any of the three petitions, three reply briefs, and two supplemental briefs filed by petitioners filed at the certiorari stage. The focus of those filings was the existence of a cause of action, not justiciability doctrines such as prudential standing. "[T]he question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute." *Bond*, 131 S. Ct. at 2362.

B. In any event, respondents possess prudential standing. They are not seeking to enforce the rights of the United States, nor of the public at large.

Instead, they seek to enforce the Supremacy Clause. That Clause (like other federalism provisions governing the relationship between the National Government and the States) was intended to protect individuals by preventing one sovereign from encroachment into its proper scope of authority. *See McCulloch v. Maryland*, 17 U.S. 316, 427-432 (1819); *Golden State*, 493 U.S. at 455 (Kennedy, J., dissenting) (describing the Supremacy Clause's "protection of the federal structure").

Just as a person has prudential standing to argue that "[t]he public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government," *Bond*, 131 S. Ct. at 2366, a person has prudential standing to argue that a law enacted by a State has been displaced by the National Government. In both circumstances, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 2364.

Further, to the extent relevant, Section 30(A) itself was enacted to ensure that beneficiaries received medical services by creating sufficient incentives for doctors to provide services to Medicaid patients. *See, supra*, pages 55-56. As beneficiaries of medical services and the providers of those services, both have a direct interest in how much the providers are paid. Indeed, the facts of these cases show that the rate cuts would have a significant and immediate

detrimental impact on both beneficiaries and providers. *See, supra*, pages 8-13. Both certainly have interests "arguably [sought] to be protected by the statutes." *Thompson v. North Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (quoting *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

Taken to its logical conclusion, petitioners apparently believe that neither providers nor beneficiaries could challenge any HHS regulations to implement Section 30(A) under the Administrative Procedure Act because they do not fall within the zone of interests. That view—that respondents cannot be parties in HHS administrative hearings and cannot appeal adverse HHS decisions or regulations—would be a nightmare for those who rely on Medicaid to provide a medical safety net.

CONCLUSION

For the reasons set forth above, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

CRAIG J. CANNIZZO
LLOYD A. BOOKMAN
JORDAN B. KEVILLE
FELICIA Y SZE
HOOPER, LUNDY & BOOKMAN, P.C.
1875 Century Park East, Suite 1600
Los Angeles, CA 90067

DEANNE E. MAYNARD
Counsel of Record
SETH M. GALANTER
NICHOLAS GEORGE MIRANDA
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-8740
dmaynard@mofo.com

JULY 29, 2011

52. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (reversing denial of injunction against state statute allowing seizure of food products, finding preemption by federal law governing food inspection, codified in Internal Revenue Code and related regulations)

53. *Hines v. Davidowitz*, 312 U.S. 52 (1941) (affirming injunction against state law requiring non-citizens to register and carry identification, finding preemption by Alien Registration Act of 1940)

54. *Mintz v. Baldwin*, 289 U.S. 346 (1933) (cattle company sought injunction against state order that required certification of disease-free cattle, claiming preemption by federal statute governing shipments from quarantined areas)

55. *Clallam County, Wash. v. United States*, 263 U.S. 341 (1923) (holding for plaintiff corporation in suit seeking decree against state and local tax, finding corporation to be an instrumentality for carrying out war formed under federal Act of July 9, 1918, and thus not subject to state taxation)

56. *Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914) (reversing denial of injunction against state taxation of railroad operating mines on land leased from Choctaw and Chickasaw Indians, finding railroad to be federal instrumentality not subject to taxation under Curtis Act of 1898)

57. *Cummings v. City of Chicago*, 188 U.S. 410 (1903) (landowners sought declaration of rights, and injunction against municipal ordinance requiring permit for dock construction, claiming preemption by River and Harbor Act of March 3, 1899)

58. *Railway Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874) (affirming injunction against county taxation of certain property, as preempted by federal Act of July 2, 1864)

59. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873) (railroad created by federal Act of July 1, 1862 filed bill to restrain county taxation of certain property, claiming preemption by federal Act of July 2, 1864)

60. *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (coal wharves owner sought injunction against state law authorizing construction of bridge over river, claiming preemption by federal Act of February 18, 1793, which authorized vessels enrolled and licensed according to its provisions to engage in coasting trade)

61. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (affirming injunction obtained by Bank of the United States against state tax, finding preemption by federal statute creating the Bank)

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 29 2011
OFFICE OF THE CLERK

Nos. 09-958, 09-1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *et al.*, *Petitioners*,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *DOMINGUEZ* RESPONDENTS IN CASE NO. 09-1158

STEPHEN P. BERZON
Counsel of Record
SCOTT A. KRONLAND
STACEY M. LEYTON
MATTHEW J. MURRAY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sberzon@altshulerberzon.com

July 29, 2011

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

Library of Congress
Law Library

QUESTION PRESENTED

Whether Medicaid recipients and providers who face injury from a state statute that conflicts with 42 U.S.C. §1396a(a)(30)(A) may maintain a cause of action for injunctive relief under the Supremacy Clause to prohibit state officials from implementing the preempted state statute.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. A PLAINTIFF INJURED BY A STATE LAW PREEMPTED UNDER THE SUPREMACY CLAUSE MAY OBTAIN A FEDERAL COURT INJUNCTION TO PROHIBIT IMPLEMENTATION OF THE LAW	7
A. The federal courts have always been open to suits by private litigants seeking to enjoin the implementation of unconstitutional state laws, including laws preempted under the Supremacy Clause, so long as jurisdiction is present	7
B. Injunction actions to enforce the Supremacy Clause are supported by the founding era understanding that courts with equitable jurisdiction would have authority to prevent injury caused by constitutional violations	11
C. Injunction actions to enforce the Supremacy Clause have correctly been treated the same as suits seeking to enforce other constitutional provisions	17
II. STATE LAWS THAT CONFLICT WITH THE MEDICAID ACT ARE PREEMPTED UNDER THE SUPREMACY CLAUSE AND MAY BE ENJOINED BY THE FEDERAL COURTS	20

TABLE OF CONTENTS—Continued

Page

III. THE COURT'S JURISPRUDENCE REGARDING 42 U.S.C. §1983 CLAIMS AND STATUTORY RIGHTS OF ACTION DOES NOT APPLY TO PROHIBITORY INJUNCTIONS SOUGHT DIRECTLY UNDER THE CONSTITUTION 29

A. Section 1983 claims and preemption injunction actions to enforce the Supremacy Clause are substantively, historically, and practically distinct 29

B. Implied statutory rights of action are distinct from injunction actions to enforce the Supremacy Clause 34

IV. CALIFORNIA'S PROPOSED LIMITATION ON SUPREMACY CLAUSE ACTIONS FOR PROHIBITORY INJUNCTIONS IS NOT SUPPORTED BY HISTORY, LOGIC, OR PRECEDENT 38

A. The Court's preemption cases cannot be explained as all involving anticipatory defenses to state regulation or quasi-regulation 39

B. Recognition of California's proposed new limitation on preemption actions would undermine the purposes of the Supremacy Clause 46

V. CALIFORNIA WAIVED ITS PRUDENTIAL STANDING ARGUMENT, WHICH IS ALSO MERITLESS 47

CONCLUSION 49

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 37

Allen v. Baltimore & O.R. Co.,
114 U.S. 311 (1885)..... 17

Arkansas Department of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006)..... 22, 2a

Askew v. America Waterways Operators, Inc.,
411 U.S. 325 (1973)..... 8a

Astra USA, Inc. v. Santa Clara County,
131 S. Ct. 1342 (2011) 30, 36

Baring v. Erdman,
2 F. Cas. 784 (No. 981) (C.C.E.D.Pa. 1834) 13

Barnes v. Gorman, 536 U.S. 181 (2002) 21

Bell v. Hood, 327 U.S. 678 (1946)..... 8

Bell v. New Jersey, 461 U.S. 773 (1983)..... 28

Bennett v. Arkansas, 485 U.S. 395 (1988) 22

Bennett v. Kentucky Department of Education,
470 U.S. 656 (1985)..... 21

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)..... 10

Blessing v. Freestone, 520 U.S. 329 (1997)..... 33

Blum v. Bacon, 457 U.S. 132 (1982)..... 22

Bond v. United States, 131 S. Ct. 2355 (2011)... 19, 20, 48

Boyer v. Boyer, 113 U.S. 689 (1885) 10

Boyle v. Zacharie, 31 U.S. (6 Pet.) 648 (1832) 16

TABLE OF AUTHORITIES—Continued

Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54, 468 U.S. 491 (1984) 6a

Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 35, 43, 4a

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987) 5a

California Division of Labor Standards Enforcement v. Dillingham Construction, 519 U.S. 316 (1997) 43, 4a

California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987) 49, 5a

California Department of Human Resources Development v. Java, 402 U.S. 121 (1971) ..... *passim*

California v. Sierra Club, 451 U.S. 287 (1981) 37

Campbell v. Hussey, 368 U.S. 297 (1961) 9a

Cannon v. University of Chicago, 441 U.S. 677 (1979) 27, 36, 37

Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691 (1984) 6a

Carleson v. Remillard, 406 U.S. 598 (1972) 22

Carlson v. Green, 446 U.S. 14 (1980) 30

Carroll v. Sanford, 44 U.S. (3 How.) 441 (1845) 13

Carter v. Greenhow, 114 U.S. 317 (1885) 19, 29

Castle v. Hayes Freight Lines, 348 U.S. 61 (1954) 10

TABLE OF AUTHORITIES—Continued

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 35

Chamber of Commerce of the United States v. Brown, 554 U.S. 60 (2008) 9, 1a

Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011) 9, 1a

Chicago & North Western Transport Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 32

Choctaw, Oklahoma, & Gulf Railroad Co. v. Harrison, 235 U.S. 292 (1914) 10a

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 39, 8a

City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424 (2002) 2a, 3a

Clallam County, Wash. v. United States, 263 U.S. 341 (1923) 10a

Clarke v. Securities Industrial Association, 479 U.S. 388 (1987) 49

Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) 10a

Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001) 10

Cort v. Ash, 422 U.S. 66 (1975) 1, 35

Coyle v. Smith, 221 U.S. 559 (1911) 10

Craig v. Boren, 429 U.S. 190 (1976) 47

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) ..... *passim*

TABLE OF AUTHORITIES—Continued

Cummings v. City of Chicago,
188 U.S. 410 (1903) 10a

Daily Income Fund, Inc. v. Fox,
464 U.S. 523 (1984) 36

Dalton v. Little Rock Family Planning Services,
516 U.S. 474 (1996) 42, 44, 4a

De Buono v. NYSA-ILA Medical & Clinical Services Fund, 520 U.S. 806 (1997) 3a, 4a

Dennis v. Higgins, 498 U.S. 439 (1991) 19

District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992) 4a

Dobbins v. Commissioners of Erie County,
41 U.S. 435 (1842) 18

Dodge v. Woolsey, 59 U.S. 331 (1855) 11

Douglas v. Seacoast Products, Inc.,
431 U.S. 265 (1977) 18, 7a, 8a

Edgar v. Mite Corp., 457 U.S. 624 (1982) 7a

Engine Manufacturers Association v. South Coast Air Quality Management District,
541 U.S. 246 (2004) 43, 2a

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 9a

Foster v. Love, 522 U.S. 67 (1997) ..... *passim*

Franklin v. Gwinnett County Public Schools,
503 U.S. 60 (1992) 35

Free Enterprise Fund v. Public Company Accounting Oversight Board,
130 S. Ct. 3138 (2010) 10, 19

TABLE OF AUTHORITIES—Continued

Gade v. National Solid Wastes Management Association, 505 U.S. 88 (1992) 48, 49, 4a, 5a

Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713 (1865) 7, 8, 11a

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) ..... *passim*

Gonzaga University v. Doe, 536 U.S. 273 (2002) ..... *passim*

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 18

Green v. Mansour, 474 U.S. 64 (1985) 6, 23, 46

Greenwood v. Union Freight Railroad Co., 105 U.S. 13 (1881) 17

Gregory v. Ashcroft, 501 U.S. 452 (1991) 20

Guardians Association v. Civil Service Commission of New York City, 463 U.S. 582 (1983) 24

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 24

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 26, 36

Hill v. Wallace, 259 U.S. 44 (1922) 19

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 6a

Hines v. Davidowitz, 312 U.S. 52 (1941) 39, 10a

Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900) 29

TABLE OF AUTHORITIES—Continued

Independent Living Center of Southern California v. Shewry, 543 F.3d 1050 (9th Cir. 2008) 2

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 8a

Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527 (1989) 36

Kentucky Association of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003) 2a

Kesler v. Department of Public Safety, Financial Responsibility Division, Utah, 369 U.S. 153 (1962) 9a

King v. Smith, 392 U.S. 309 (1968) 21, 24, 25

Lawrence County v. Lead-Deadwood School District, 469 U.S. 256 (1985) 9, 23, 44, 6a

Lawrence County v. South Dakota, 668 F.2d 27 (8th Cir. 1982) 23

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 3a

Maine v. Thiboutot, 448 U.S. 1 (1980) 34

Malone v. White Motor Corp., 435 U.S. 497 (1978) 7a

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) 36

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 18, 33

Mid-Con Freight System, Inc. v. Michigan Public Service Commission, 545 U.S. 440 (2005) 10

TABLE OF AUTHORITIES—Continued

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981) 37

Miller v. Youakim, 440 U.S. 125 (1979) 22

Mintz v. Baldwin, 289 U.S. 346 (1933) 10a

Monroe v. Pape, 365 U.S.167 (1961) 31, 33

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 5a

Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869 (2010) 35

Musick, Peeler & Garrett v. Employers Insurance of Wausau, 508 U.S. 286 (1993) 35, 36

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 43, 4a

New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) ... 43, 44, 7a

National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998) 49

New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978) 7a

Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77 (1981) 36

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) ..... *passim*

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,461 U.S. 190 (1983) 6a, 7a

TABLE OF AUTHORITIES—Continued

Parker v. Brown, 317 U.S. 341 (1943) 9a

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 27, 28

Pennoyer v. McConnaughy, 140 U.S. 1 (1891) 17

Pennsylvania Pharmacists Association v. Houstoun, 283 F.3d 531 (3d Cir. 2002) 49

Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge I*), 54 U.S. (13 How.) 518 (1851) 16

Pennsylvania v. Wheeling & Belmont Bridge Co. (*Wheeling Bridge II*), 59 U.S. (18 How.) 421 (1855) 8

Perez v. Campbell, 402 U.S. 637 (1971) 42, 8a

Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003) 43, 44, 45

Philadelphia Co. v. Stimson, 223 U.S. 605 (1912) 17

Philbrook v. Glodgett, 421 U.S. 707 (1975) 22

Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) 22

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 10, 11

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) 36

Poindexter v. Greenhow, 114 U.S. 270 (1885) 17

Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943) 9a

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 5a

TABLE OF AUTHORITIES—Continued

Railroad Transfer Service, Inc. v. City of Chicago, 386 U.S. 351 (1967) 9a

Railway Co. v. McShane, 89 U.S. (22 Wall.) 444 (1874) 10a

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 7a

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) 17

Robinson v. Campbell, 16 U.S. (3 Wheat) 212 (1818) 16

Rosado v. Wyman, 397 U.S. 397 (1970) ..... *passim*

Rowe v. New Hampshire Motor Transport Association, 552 U.S. 364 (2008) 9, 1a, 2a

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 36

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 5a

Scott v. Donald, 165 U.S. 107 (1897) 17

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) ..... *passim*

Shea v. Vialpando, 416 U.S. 251 (1974) 22

Singleton v. Wulff, 428 U.S. 106 (1976) 47

Smyth v. Ames, 169 U.S. 466 (1898) 17

South Dakota v. Dole, 483 U.S. 203 (1987) 23, 27

State v. Wilson, 11 U.S. (7 Cranch) 164 (1812) 16

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008) 35, 37

TABLE OF AUTHORITIES—Continued

Suter v. Artist M., 503 U.S. 347 (1992) 25, 33

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 18

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 47

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 36

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 36

Townsend v. Swank, 404 U.S. 282 (1971) 21

Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979) 36

Ex parte Tyler, 149 U.S. 164 (1893) 17

Union Pacific Railroad Co. v. Peniston, 85 U.S. (18 Wall.) 5 (1873) 11a

United States v. Locke, 529 U.S. 89 (2000) 3a

United States v. Stanley, 483 U.S. 669 (1987) 10

Universities Research Association, Inc. v. Coutu, 450 U.S. 754 (1981) 36

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 25, 3a

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 36

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 2a

Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829) 16

White v. Greenhow, 114 U.S. 307 (1885) 29

TABLE OF AUTHORITIES—Continued

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 26

Wilson v. Garcia, 471 U.S. 261 (1985) 33

Winkleman v. Parma City School District, 550 U.S. 516 (2007) 27, 28

Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986) ..... *passim*

Youakim v. Miller, 425 U.S. 231 (1976) 22

Ex parte Young, 209 U.S. 123 (1908) ..... *passim*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 19

STATE CASES

Belknap v. Belknap, 2 Johns. Ch. Rep. 463 (N.Y. Ch. 1817) 13, 41, 42

Bradley v. Commissioners, 21 Tenn. 428 (1841) 16

Burnet v. Corporation of Cincinnati, 3 Ohio 73 (1827) 41

Cooper v. Alden, Harrington's Ch. Rep., 72 (Mich. Ch. 1838) 42

Galloway v. Jenkins, 63 N.C. 147 (1869) 16

Gardner v. Trustees of Village of Newburg, 2 Johns. Ch. Rep. 162 (N.Y. Ch. 1816) 41

Graham v. Horton, 6 Kan. 343 (1870) 16

TABLE OF AUTHORITIES—Continued

Gray v. Yeamans, Journal of the Grand Council of South Carolina, 1671-1680 (S.C. 1671), reprinted in *Records of the Court of Chancery of South Carolina, 1671-1779*, (1950 ed.) 41

Lindsay v. East Bay Street Commissioners, 2 Bay 38 (S.C. Const. 1796) 16

Portues v. Tapham, Case No. 30, *Registrar's Book of Governor Keith's Court of Chancery* (Pa. 1735) 40

Turpin v. Locket, 10 Va. (6 Call) 113 (1804) 16

Wightman v. Brown, 1 S.C. Eq. Rep. 166 (1790) 40

ENGLISH CASES

Attorney-General v. Forbes, 2 Mylne & Craig 123 (Ch. 1836) 41

Attorney General v. Heelis, 2 Simons & Stuart 67 (Ch. 1824) 40

Attorney General v. Mayor &c. of Dublin, 1 Bligh 312 (H.L. 1827) 40, 41

Bosanquett v. Dashwood, Forrester, 39 (Ch. 1734) 40

Box v. Allen,1 Dickens 84 (Ch. 1727) 13

Bromley v. Smith, 1 Simons 8 (Ch. 1826) 42

Brownsword v. Edwards, 2 Vesey 243 (Ch. 1750) 15

Ewelme Hospital v. Andover, 1 Vernon 266 (Ch. 1684) 41

TABLE OF AUTHORITIES—Continued

Frewin v. Lewis, 4 Mylne & Craig 249 (Ch. 1838) .. 13, 42

Hall v. Mason, Callis, 262 (1621), in *The Reading of the Famous and Learned Robert Callis, Esq. Upon the Statute of Sewers* 262 (4th ed. 1824) 13, 41

How v. Tenants of Bromgrove, 1 Vernon 22 (Ch. 1681) 41

Hughes v. Trustees of Morden College, 1 Vesey 188 (Ch. 1748) 12, 13, 41

Rankin v. Huskisson, 4 Simons 13 (Ch. 1830) 41

Pilkington v. City of York, 1 Dickens 84 (Ch. 1742) 13

Year Book of Henry VII, folio 12 (1491) 15

FEDERAL CONSTITUTION AND STATUTES

U.S. Const., Art. I, §8, cl. 1 22

U.S. Const., Art. I, §8, cl. 3 23

U.S. Const., Art. III 1, 15, 37, 47

U.S. Const., Art. VI, cl. 2 ..... *passim*

28 U.S.C. §2281 18

29 U.S.C. §1144(a) 38

31 U.S.C. §6901 23

42 U.S.C. §1320a-2 26

42 U.S.C. §1320a-10 26

42 U.S.C. §1396a(a)(30)(A) ..... i, 1, 3, 28

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1988(b) 31

TABLE OF AUTHORITIES—Continued

Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73 ..... 8, 16

Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470 ..... 8, 17

Ku Klux Act of April 20, 1871, ch. 22, §1, 17 Stat. 13 32

STATE STATUTES

2009 Cal. Leg. Serv. 3rd Ex. Sess. Ch. 13 (S.B. 6) 2

Cal. Welf. & Inst. Code §12306.1(d)(7)(B) 3

MISCELLANEOUS

Matthew Bacon, *A New Abridgement of the Law* (6th ed. 1743) 14, 15

Cong. Globe, 42d Cong., 1st Sess. App. 50 (1871) (Statement of Rep. Kerr) 31

Cong. Globe, 42d Cong., 1st Sess. App. 365 (1871) (Statement of Rep. Arthur) 31

Cong. Globe, 42d Cong., 1st Sess. App. 385 (1871) (Statement of Rep. Lewis) 31

Cong. Globe, 42d Cong., 1st Sess. App. 420 (1871) (Statement of Rep. Bright) 32

Cong. Globe, 42d Cong., 1st Sess. App. 477 (1871) (Statement of Rep. Butler) 31

Cong. Globe, 42d Cong., 1st Sess. App. 477 (1871) (Statement of Rep. Dawes) 30, 31

Robert Henley Eden, *A Treatise on the Law of Injunctions* (1821) 41

Max Farrand, *The Records of the Federal Convention of 1787* (1911 ed.) 20

John Fonblanque, *A Treatise of Equity* (1793) 40, 41

TABLE OF AUTHORITIES—Continued

Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, in *Report of the Proceedings of the Bar Association of Arkansas* 130 (1914-1915)..... 15

F.W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* (1929 ed.)..... 12

John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* (2d ed. 1787).. *passim*

John Norton Pomeroy, *Equity Jurisprudence* (1881)..... 14, 15, 40, 41

David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004)..... 33

Joseph Story, *Equity Jurisprudence* (1836) .. 14, 15, 16, 40

Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, in 2 *Select Essays in Anglo-American Legal History* 779 (1907)..... 12

INTRODUCTION

The California Legislature adopted a statute that would reduce the State's contribution to the rates used by the State's Medicaid program in paying for in-home supportive services. In the *Dominguez* case, a group of Medicaid beneficiaries and providers who faced imminent injury sought injunctive relief against this statute. The District Court entered a prospective injunction to prevent California officials from implementing the new statute on the ground that the statute conflicts with 42 U.S.C. §1396a(a)(30)(A) ("30(A)") and therefore is preempted under the Supremacy Clause. In this regard, the *Dominguez* case is structurally indistinguishable from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Foster v. Love*, 522 U.S. 67 (1997), and countless other cases since the founding, in which the federal courts granted prospective injunctive relief to prevent state officials from implementing state laws that are preempted under the Supremacy Clause and would cause injury to plaintiffs with Article III standing.

California devotes much of its Brief to defending the premise that there is no such thing as a "cause of action" for injunctive relief that arises directly under the Supremacy Clause. Based on that premise, California argues that the *Dominguez* plaintiffs' plea for injunctive relief should not have been heard, because the pertinent federal statute does not give them a "right" enforceable through 42 U.S.C. §1983 ("§1983") under the *Gonzaga University v. Doe*, 536 U.S. 273 (2002) analysis, or an implied statutory cause of action under the *Cort v. Ash*, 422 U.S. 66 (1975) analysis. Pet. Br. 14-15, 20-23. But accepting California's premise would require elimination of a *constitutional* cause of action available in the federal courts since the inception of the Republic.

Even California ultimately acknowledges that this Court has authorized injunctive relief in numerous actions arising directly under the Supremacy Clause. Pet. Br. 43-44. And this Court's Supremacy Clause cases, which include actions like this one, are firmly rooted in the traditional equitable authority of the federal courts and are necessary to secure the constitutional balance of powers between the federal and state governments. The Constitution and Congress have vested the federal courts with equity jurisdiction, and the courts have a duty to exercise that jurisdiction to enjoin preempted state laws.

STATEMENT OF THE CASE

The *Dominguez* Respondents were the plaintiffs in one of the three cases covered by the Petition in No. 09-1158. The facts and procedural history in California's Statement of the Case are correct as they relate to the *Dominguez* case, with a few exceptions, set forth in the accompanying footnote.[1] Additionally: California does not explain that, after the District Court's preliminary injunction, the California Legislature delayed the effective date of the statute challenged in *Dominguez* until the later of July 1,

---

[1] First, California asserts that among the purposes of the challenged statutes was "increasing the efficiency of the State's Medicaid program." Pet. Br. 5. But it was not disputed below that the sole purpose of the statute challenged in *Dominguez* was to address the State's budget deficit. 2009 Cal. Leg. Serv. 3rd Ex. Sess. Ch. 13 (S.B. 6), §13. Second, Respondents disagree that the statute reducing the State's maximum contribution to provider payments left the methodology for determining payments unchanged. Pet. Br. 9. Third, the Court of Appeals panel that issued the decisions in Cases 09-1158 and 09-958 was comprised of two of the same judges as the *Independent Living Center of Southern California v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) (*Independent Living I*) panel but the third judge was not the same. Pet. Br. 14 n.5. Finally, California includes argument within its Statement of the Case that the *Dominguez* Respondents address in the body of this brief. *E.g.*, Pet. Br. 5-6.

2012 or the date that a court renders a final judgment upholding its validity. *See* Cal. Welf. & Inst. Code §12306.1(d)(7)(B).

SUMMARY OF ARGUMENT

1. The *Dominguez* plaintiffs faced injury from the implementation of a state statute that conflicts with 42 U.S.C. §1396a(a)(30)(A) and therefore is invalid under the Supremacy Clause. They obtained a prospective injunction to prevent implementation of the preempted state law. As such, their suit is structurally indistinguishable from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Foster v. Love*, 522 U.S. 67 (1997), and countless cases decided by the federal courts since the founding. These cases arise under the Supremacy Clause and are grounded in the traditional equitable powers of the federal courts.

As amicus United States recognizes, the availability of federal court suits for prospective injunctive relief against state statutes preempted by federal law under the Supremacy Clause is "well established" and "serves an important purpose" by "appropriately vindicat[ing] the supremacy of federal law." U.S. Br. 20-21 & n.7. This Court recognized the viability of such suits in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), reaffirmed their viability in *Shaw*, 463 U.S. at 96 n.14, and has decided on the merits at least 61 such cases, including many in just the past few terms. *See* Appendix (listing cases). As Justice Kennedy explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting).

These suits fall within a broader category of cases authorized by the courts' traditional authority to grant

equitable relief – as opposed to damages – to enforce the Constitution. The Supremacy Clause must be read in light of the founding-era understanding that courts with equity jurisdiction could provide individuals equitable relief for injuries caused by public officials acting in excess of their legal authority.

2. State laws that conflict with the Medicaid Act are preempted under the Supremacy Clause and therefore may be enjoined by the federal courts. While the Court has used a contract analogy as an interpretative aid in some Spending Clause cases, it has always recognized that statutes adopted under Congress' spending powers are "Laws of the United States" for purposes of the Supremacy Clause. U.S. Const., Art VI, cl. 2. Consequently, the Court repeatedly has struck down state laws preempted by Spending Clause statutes.

The Court long ago rejected California's argument that the Supremacy Clause is inapplicable when state participation in a Spending Clause program is voluntary. The Court also long ago rejected California's argument that the presence of a withholding-of-funds remedy as part of Spending Clause programs established by the Social Security Act (which include Medicaid programs) demonstrates that Congress intended to strip the courts of their traditional jurisdiction to enjoin implementation of state laws that are preempted under the Supremacy Clause. The Court found "not the slightest indication" of congressional intent to do so. *Rosado v. Wyman*, 397 U.S. 397, 420, 422 (1970). Congress has ratified that interpretation of the pertinent statutes. And amicus United States pointedly "is *not* suggesting that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." U.S. Br. 32 n.12 (emphasis added; internal quotations and citations omitted).

3. Precedents regarding whether statutes create individual "rights" enforceable under 42 U.S.C. §1983 are not relevant to suits for prospective injunctive relief under the Supremacy Clause. Those §1983 cases deal with an issue of statutory interpretation and a statute that provides for compensatory and punitive damages. The Court's precedents make clear that the unavailability of a claim under §1983 does not mean that the federal courts cannot grant injunctive relief to enforce the Constitution.

Likewise, jurisprudence regarding implied statutory rights of action does not govern this case. Those cases are about congressional intent to authorize a statutory cause of action, which generally would allow damages suits against private defendants for private actions. Such claims are entirely divorced from claims for equitable relief directly under the Supremacy Clause to prevent implementation by public officials of preempted state laws.

4. California proposes that the Court limit the availability of Supremacy Clause injunction actions to situations in which the plaintiff effectively asserts an "anticipatory defense" to a state regulatory action. But that proposed limitation on the authority of the federal courts is not supported by history or precedent.

The historical practice at the founding did not limit equitable relief to plaintiffs seeking to enjoin actions at law or to situations in which an enforcement action could be brought against the plaintiff. And, as a matter of precedent, this Court has authorized Supremacy Clause preemption injunctions where the plaintiff faced no threat of enforcement or regulatory proceedings. *See, e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000); *Foster v. Love*, 522 U.S. 67, 68-69, 74 (1997); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 283-84 & nn.1-2

(1986). Moreover, the availability of private litigation to vindicate the supremacy of federal law is *more* important when no state enforcement action could be brought.

The United States posits that cases like *Crosby* are permissible Supremacy Clause suits only because they involve, "in effect, [plaintiffs] asserting an immunity" from what were, "in essence, state regulatory requirements" directed at their "primary conduct." U.S. Br. 22-24 & nn.8-9. But that theory finds no support in this Court's cases, lacks any theoretical or historical basis, and fails to explain cases like *Foster*, 522 U.S. at 68-69, 74 (state primary law preempted by federal statute setting date for elections), as well as numerous other decisions in which this Court has decided preemption injunction claims involving disputes over government benefits, in which no such "in essence" regulation argument could be made.

The sum of the matter is that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). That interest is as present in Supremacy Clause injunction actions like this one as in the actions California would allow.

5. Finally, California waived its prudential standing argument by not challenging the *Dominguez* plaintiffs' prudential standing below or raising the issue in its certiorari petition. In any event, the argument is meritless, because the *Dominguez* plaintiffs are Medicaid providers and beneficiaries who are injured by the Supremacy Clause violation at issue and easily meet the prudential standing test.

ARGUMENT

I. A PLAINTIFF INJURED BY A STATE LAW PREEMPTED UNDER THE SUPREMACY CLAUSE MAY OBTAIN A FEDERAL COURT INJUNCTION TO PROHIBIT IMPLEMENTATION OF THE LAW

A. The federal courts have always been open to suits by private litigants seeking to enjoin the implementation of unconstitutional state laws, including laws preempted under the Supremacy Clause, so long as jurisdiction is present

Actions seeking prospective injunctive relief to enforce the Supremacy Clause are not a new phenomenon. As the United States as amicus recognizes, the availability of suits for injunctive relief against state laws preempted by federal law under the Supremacy Clause is "well established," "serves an important purpose" by "appropriately vindicat[ing] the supremacy of federal law," and is rooted in the federal courts' traditional equitable powers to grant injunctive relief. U.S. Br. 20-21 & n.7.

This Court held in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that "[i]t was proper" for a federal court to issue an injunction prohibiting a state official from implementing a state law (in that case a tax) that was "repugnant to a law of the United States, made in pursuance of the constitution," (there the statute creating the Bank of the United States), explaining that the case was properly "cognizable in a Court of equity." *Id.* at 839, 859, 865, 867-68. In *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 719, 721-24 (1865), the Court decided on the merits a suit to enjoin a state law authorizing construction of a bridge allegedly "repugnant to the Constitution and laws of the United States," including a federal statute that "authorize[d] vessels enrolled and licensed according to its provisions to engage in the

coasting trade." *Id.* at 724. The Court rejected the argument that only the federal government could bring the suit, explaining that "wherever a public nuisance is productive of a specific injury to an individual, . . . if the injury would be irreparable, . . . a court of equity will interpose by injunction." *Id.* at 722 (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (*Wheeling Bridge II*)).[2]

This Court reaffirmed the federal courts' authority to hear such cases in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), explaining that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §1331 to resolve." *Id.* at 96 n.14.

Though *Shaw* spoke in terms of "jurisdiction" without expressly referring to the plaintiffs' "cause of action," the Court's resolution of the case went beyond a recognition of subject matter jurisdiction. Unlike in *Bell v. Hood*, 327 U.S. 678, 681-85 (1946), the Court in *Shaw* did not simply conclude that the district court had jurisdiction, but rather it went on to resolve the case on the merits and strike down the preempted state law. The Court noted that it "frequently has resolved pre-emption disputes in a similar jurisdictional posture." 463 U.S. at 96 n.14 (citing cases).

---

[2] Congress conferred general federal question jurisdiction on the federal courts in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. Earlier, jurisdiction was generally limited to cases in diversity, with some narrow exceptions. *See* Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73. During that time, injunction actions to enforce the Supremacy Clause were available where the federal courts had jurisdiction over the case. *See, e.g., Osborn*, 22 U.S at 817-18 (jurisdiction conferred by statute incorporating Bank of the United States); *Gilman*, 70 U.S. at 719, 721 (diversity).

Thus, as Justice Kennedy correctly explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting). This Court also pointed out in *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985), that a claim that a state law is preempted by a federal statute adopted under Congress' Spending Clause authority states a federal claim under the same rationale applied in *Shaw*. 469 U.S. at 259 n.6.

The cases listed in the accompanying Appendix reflect that this Court has decided at least 61 cases brought in federal court directly under the Supremacy Clause for injunctive or declaratory relief against preempted state laws, including several in just the past few terms. *See, e.g., Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct. 1968, 1977, 1987 (2011) (reaching merits in injunctive suit by business and civil rights groups alleging state law preempted by federal immigration law); *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 64-66 (2008) (holding state statute preempted by National Labor Relations Act); *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 369 (2008) (holding state statute preempted by Federal Aviation Administration Authorization Act).[3] Countless such cases have been heard by the lower federal courts without reaching this

---

[3] Based on our review, the preemption claims in the cases listed in the Appendix were not brought under 42 U.S.C. §1983; nor does it appear that the federal statutes involved contain the type of "rights-creating" language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). *See infra* at 38-39. The Appendix does not contain numerous additional cases decided by this Court in which Supremacy Clause injunction claims were initially brought in state court. *See infra* at 10.

Court. This Court has also decided on the merits numerous federal Supremacy Clause injunction claims brought initially in the state courts. *See, e.g., Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 442, 445 (2005); *Castle v. Hayes Freight Lines*, 348 U.S. 61, 62-63 (1954); *Coyle v. Smith*, 221 U.S. 559, 562-65 (1911); *Boyer v. Boyer*, 113 U.S. 689, 690-91 (1885).

These actions fall within a broader category of cases granting equitable relief, which "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3151 n.2 (2010) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

While this Court has been reluctant to recognize new causes of action to seek *damages* for constitutional violations, it has repeatedly stressed the important distinction between damages and injunctive relief, reaffirming the traditional availability of the latter in suits to enforce the Constitution. *See, e.g., United States v. Stanley*, 483 U.S. 669, 683 (1987) (claims for injunctive relief, unlike claims for money damages, are "designed to halt or prevent the constitutional violation . . . [, seek] traditional forms of relief, and '[do] not ask the Court to imply a new cause of action.'") (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 n.2 (1983)); *Malesko*, 534 U.S. at 74; *cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (recognizing "presumed availability of federal equitable relief against threatened invasions of constitutional interests"). The distinction between suits for damages and those seeking equitable relief reflects the historical grounding of the latter in the federal courts' traditional equitable powers. *See Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity").

Thus, injured individuals have since the founding been able to seek prohibitory injunctions against state officials in the federal courts to prevent implementation of unconstitutional laws, so long as the case otherwise fell within the federal courts' jurisdiction. *See, e.g.*, *Osborn*, 22 U.S. at 868, 870 (state act "repugnant" to law constituting Bank of the United States was "unconstitutional and void"); *Dodge v. Woolsey*, 59 U.S. 331, 336, 339, 360-61 (1855) (state law violated contracts clause); *Ex parte Young*, 209 U.S. 123, 144 (1908) (state law violated due process); *Pierce*, 268 U.S. at 534-36 (state law contrary to Fourteenth Amendment liberty interests).

B. Injunction actions to enforce the Supremacy Clause are supported by the founding era understanding that courts with equitable jurisdiction would have authority to prevent injury caused by constitutional violations

Not only are injunctions to enforce the Supremacy Clause not a new phenomenon, but they are firmly grounded in the founding generation's understanding of equity jurisdiction. California's ahistorical approach ignores the background against which the Supremacy Clause and the other provisions of the Constitution were adopted.[4]

The framers drafted the Constitution, and the founding generation ratified it, within an existing jurisprudential framework that defined judicial authority and determined which cases courts would properly entertain. Operating within this framework, the framers and ratifiers would

---

[4] Likewise, amicus National Governors Association offers an account of the colonial practice of appeals to the Privy Council in England, but says nothing about types of cases the founding generation would have understood to be cognizable in courts of equity. Nat'l Govs. Ass'n Br. 4-13.

have expected that a court with equitable jurisdiction could provide injured individuals relief for injuries caused by constitutional violations, without requiring that the plaintiff point to a statute creating a specific "cause of action." Whatever the Court's modern jurisprudence may say about the viability of suits seeking redress for purely statutory violations, the availability of suits to enforce the *Constitution* through equitable relief stems from this founding era understanding of the authority of courts of equity.

1. While common law courts in the eighteenth century would hear cases only where the plaintiff's injuries conformed to a recognized form of action, F.W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* 296-300 (1929 ed.), equity courts ("chancery courts") could hear cases and provide relief for injuries that did not conform to the set common law forms. John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* 7-9 (2d ed. 1787) ("Mitford").[5] To be entitled to equitable relief, plaintiffs had to show "that the acts complained of are contrary to equity, and tend to the *injury* of the complainants, and that they have no remedy, or not a complete remedy, without the assistance of the court." *Id.* at 43 (emphasis added).

In accord with this basic rule, at the time of the founding, suits in equity against public officials were available to prevent injury caused by actions taken in excess of the officials' legally conferred authority. *See, e.g., Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (suit in English High Court of Chancery against turnpike com-

---

[5] "Prior to the Revolution, courts of chancery had existed in some shape or other in every one of the thirteen colonies." Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, in 2 *Select Essays in Anglo-American Legal History* 779, 779 (1907).

missioners).[6] Cases from both America and England decided after the founding confirm the settled principle that "relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Carroll v. Sanford*, 44 U.S. (3 How.) 441, 463 (1845); *see, e.g., Belknap v. Belknap*, 2 Johns. Ch. Rep. 463, 473 (N.Y. Ch. 1817) (based on "well settled" "jurisdiction of chancery," if commissioners "exceeded their powers, . . . chancery would restrain them by injunction, and keep them strictly within the limits of their power") (citing cases); *Baring v. Erdman*, 2 F. Cas. 784, 786 (No. 981) (C.C.E.D.Pa. 1834) (where acts of public officials "transcend the authority conferred on them by law," they are subject to control by injunction to prevent "irreparable injury"); *Frewin v. Lewis*, 4 Mylne & Craig 249, 254-55 (Ch. 1838) (equity court will prevent injury by enjoining public officials from acting "beyond the line of their authority"). Applying this principle, the founding generation understood that suits would be available in courts with equity jurisdiction to enjoin public officials from exceeding the limits on their authority set in the Constitution. The Supremacy Clause is, of course, one such limit.

2. It would be contrary to the understanding at the founding to limit suits to enforce the Constitution to circumstances in which a statute provides the plaintiff a "right" as that term is used in the context of this Court's modern 42 U.S.C. §1983 and implied-statutory-right-of-

---

[6] The authority of courts of equity to enjoin public officials from causing injury has ancient roots. *See, e.g., Hall v. Mason*, Callis, 262 (1621) (suit in equity against Commissioners of Sewers), discussed in *The Reading of the Famous and Learned Robert Callis, Esq. Upon the Statute of Sewers* 262 (4th ed. 1824); *Box v. Allen*, 1 Dickens 49 (Ch. 1727) (Commissioners of Sewers); *Pilkington v. City of York*, 1 Dickens 84 (Ch. 1742) (city).

action jurisprudence. Indeed, in the founding era a plaintiff in equity did not have to show that a statute provided a "right" even as the term was understood then (*i.e.*, a legal interest recognized by the common law courts), nor did a plaintiff have to show a right to proceed at common law against the defendant. Rather, the founding generation understood the question whether a party could bring suit in equity to redress a particular injury to be a question about the scope of the court's "jurisdiction." *See* Mitford at 103-04 (discussing availability of equitable relief in terms of "jurisdiction"); *id.* at 120-21 (to support bill in equity where plaintiff suffers injury and common law provides no remedy or recognizes no right at all, plaintiff must "sh[o]w that the subject of the suit is such upon which a court of equity will assume jurisdiction").

Equity courts had jurisdiction to exercise power in a variety of contexts, including both "where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose," *and* "where the principles of law by which the ordinary courts are guided *give no right*, but upon the principles of universal justice the inference of the judicial power is necessary to prevent a wrong, and the positive law is silent." Mitford at 103-04 (emphasis added); *see* 1 Joseph Story, *Equity Jurisprudence* §29 (1836) ("Story"); 1 John Norton Pomeroy, *Equity Jurisprudence* §424 (1881) ("Pomeroy"). The question was whether the defendant's unlawful acts unjustly "tend to the *injury* of the complainant." Mitford at 43 (emphasis added). Where a court of equity exercised its authority, it would issue injunctions "to restrain the defendant from . . . doing any injurious act." *Id.* at 46; *see also* 3 Matthew Bacon, *A New Abridgement of the Law* 172 (6th ed. 1743) (defining injunction as "a prohibitory Writ, restraining a Person from committing or

doing a Thing which appears to be against Equity and Conscience") (citing cases).[7]

While the common law courts "viewed an action as a test of a judicial right asserted," the equity courts "viewed a suit from the standpoint of the wrong presented for investigation." Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, in *Report of the Proceedings of the Bar Association of Arkansas* 130, 131 (1914-1915). Equity jurisdiction was exercised upon the ground "that a wrong [wa]s done, for which there [wa]s no plain, adequate, and complete remedy in the Courts of Common Law." 1 Story §49. By the time of the founding, this basic guiding equitable principle had long been established. As but one example, in a case decided in 1491, Chancellor Morton, Archbishop of Canterbury, responded to an argument that he was without jurisdiction because upon the facts the common law admitted no right and gave no remedy, by stating: "It is so in all cases where there is no remedy at the common law and no right, and yet a good remedy in equity." Year Book of Henry VII, folio 12 (quoted in 1 Pomeroy §50); *see also* 1 Pomeroy §423.

3. The Constitution authorized the creation of federal courts that would have all the traditional equitable powers by declaring in Article III that the judicial power of the United States extends "to all cases, in Law and Equity." The first Congress then delineated the initial set of cases in

---

[7] Plaintiffs whose claims sounded in equity may have lost *on the merits* if they did not have an "[i]nterest in the subject of the suit," for example "where a plaintiff claimed under a will, and it was apparent upon the construction of the will that he had no title," Mitford at 136 (citing *Brownsword v. Edwards*, 2 Vesey 243, 247 (Ch. 1750)), or if they did not have "proper title to institute a suit concerning" the subject matter, for example where an executor had not properly proved the validity of the will of his testator. Mitford at 137-38 (citing cases).

which the federal courts could exercise their equitable authority by granting the courts diversity jurisdiction over suits "in equity" in the Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 78. In doing so, the founding Congress intended the federal courts to apply the principles and provide the remedies available in the High Court of Chancery in England. *See Robinson v. Campbell*, 16 U.S. (3 Wheat) 212, 222-23 (1818); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832); *see also* 1 Story §57. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (*Wheeling Bridge I*), the Court summarized the rule, which had been observed in the federal courts "since the organization of the government," that in equity suits "[t]he usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings," and "there is no other limitation to the exercise of a chancery jurisdiction by these courts," except limitations in statutes defining federal court jurisdiction generally. *Id.* at 563.

Early practices of both federal and state courts reflect that traditional equitable principles authorized suits by individuals threatened with injury for equitable relief against the operation of unconstitutional state laws, where no adequate remedy was available at law. *See, e.g, Osborn*, 22 U.S. at 845 (holding case to be one "in which a Court of equity ought to interpose"); *State v. Wilson*, 11 U.S. (7 Cranch) 164, 166, 166-67 (1812) (state court suit to prevent operation of state law in conflict with federal constitution); *cf. Weston v. City Council of Charleston*, 27 U.S. 449, 450 (1829) (state court prohibition action); *Lindsay v. East Bay Street Comm'rs*, 2 Bay 38 (S.C.Const. 1796) (same).[8]

---

[8] State courts' early practice of entertaining injunctive suits to prevent implementation of state laws under state constitutions reflects the same basic understanding of traditional equitable principles. *See, e.g., Turpin v. Locket*, 10 Va. (6 Call) 113 (1804); *Bradley v. Commissioners*, 21 Tenn. 428 (1841); *Galloway v. Jenkins*, 63 N.C. 147 (1869); *Graham v. Horton*, 6 Kan. 343 (1870).

Suits to enforce the Constitution through equitable relief proliferated after Congress granted general federal question jurisdiction to the federal courts in all cases "in equity" in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. *See, e.g.*, *Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 14, 16-17 (1881); *Poindexter v. Greenhow*, 114 U.S. 270, 275 (1885); *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311, 311-13 (1885); *Pennoyer v. McConnaughy*, 140 U.S. 1, 8, 25 (1891); *Ex parte Tyler*, 149 U. S. 164, 187-88 (1893); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 393, 399 (1894); *Scott v. Donald*, 165 U.S. 107, 108-09, 112 (1897); *Smyth v. Ames*, 169 U.S. 466, 469-70, 476-77, 517, 522-23 (1898); *see also Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing numerous cases where "state officers seeking to enforce unconstitutional enactments" were subject to "injunction process" to prevent "injury threatened by [officers'] illegal action"). This Court reaffirmed the viability of such suits in *Ex parte Young*, 209 U.S. 123, 149, 167 (1908).

C. Injunction actions to enforce the Supremacy Clause have correctly been treated the same as suits seeking to enforce other constitutional provisions

This Court has never distinguished the availability of suits seeking injunctive relief to enforce the Supremacy Clause from suits seeking such relief to enforce other provisions of the Constitution. Nor is there a reasoned basis for such a distinction.

The Supremacy Clause declares that both "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl.2. In their relation to state laws, the Supremacy Clause places the Constitution and laws of the United States on equal footing. There is no structural or textual reason to distinguish between them for

purposes of injunctive suits to prevent implementation of invalid state laws. A state official violates the federal Constitution when he enforces a state statute that conflicts with either source of supreme law.

Moreover, contrary to California's contention (Pet. Br. 35-36), a suit to enforce the Supremacy Clause *is* a suit that arises directly under the Constitution. *See Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977) (preemption "claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"). A state law "cannot be constitutional" if "it conflicts with a law of congress made in pursuance of the constitution, and which makes it the supreme law of the land." *Dobbins v. Commissioners of Erie County*, 41 U.S. 435, 450 (1842), *overruled on other grounds by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 481-82, 486 (1939); *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that "the unavoidable consequence of that supremacy which the constitution has declared" is that state laws that act "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress" are "unconstitutional and void"); *Osborn*, 22 U.S. at 868, 870 (state law "repugnant to a law of the United States" is "unconstitutional and void").[9]

---

[9] *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), is not to the contrary. The Court there dealt with a pure issue of statutory interpretation, *i.e.*, whether Congress meant the jurisdiction of three-judge district courts, which was limited to situations where a state statute was challenged "'upon the ground of the unconstitutionality of such statute,'" to cover suits to enjoin enforcement of state laws based on alleged conflict with a federal statute. *Id.* at 114 (quoting 28 U.S.C. §2281). The Court recognized that such suits do seek relief on "constitutional grounds," because "any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.* at 125. Nonetheless, while

(*continued* . . .)

California suggests that other provisions of the Constitution involve individual "rights," but this Court has decided on the merits many actions for prospective injunctive relief to enforce *structural* provisions of the Constitution. *See, e.g.*, *Free Enterprise Fund*, 130 S.Ct. at 3151 n.2 (rejecting argument that "Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 589 (1952) (steel mill seizures exceeded President's constitutional powers); *Hill v. Wallace*, 259 U.S. 44, 67-68, 70 (1922) (federal statutory provision unenforceable because exceeded Congress' enumerated powers); *cf. Dennis v. Higgins*, 498 U.S. 439, 458 (Kennedy, J., dissenting) (like Contracts Clause, even if Commerce Clause secures no "rights" in the §1983 sense, "courts provide a person injured by taxation that exceeds the limits of the Commerce Clause the 'right to have a judicial determination, declaring the nullity of the attempt to' levy a discriminatory tax") (quoting *Carter v. Greenhow*, 114 U.S. 317, 322 (1885)).

That being so, there is no reason to distinguish suits for injunctive relief under the Supremacy Clause. As this Court has explained, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury . . . ." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011). Individual equitable suits to enforce the Supremacy Clause effectuate "[t]he Framers['] conclu[sion] that allocation of powers between the National Government and the States

---

(. . . *continued*)
acknowledging that its reading of the statute was not "compelled" by its text, the Court chose to narrowly construe the jurisdiction of three-judge courts because of the particular concerns of the legislators who enacted the jurisdictional statute and "important considerations of judicial administration." *Id.* at 126-29.

enhances freedom . . . [b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* at 2364. "In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

California does not show otherwise by pointing out that the framers intended the Supremacy Clause to be a "rule of decision" governing how to resolve conflicts between federal and state law when they arose. Pet. Br. 17-18, 35-36. Almost every provision of the Constitution acts as a "rule of decision" when cases implicating it arise. More to the point, the framers understood that a court with equity jurisdiction would have the power to decide suits seeking to "set aside" and "declare . . . void" unconstitutional state laws in order to ensure the supremacy of national law. 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 27 (1911 ed.) (Madison); *id.* at 28 (Morris); *id.* at 391 (Wilson); *see supra* at 11-16.

II. STATE LAWS THAT CONFLICT WITH THE MEDICAID ACT ARE PREEMPTED UNDER THE SUPREMACY CLAUSE AND MAY BE ENJOINED BY THE FEDERAL COURTS

The above discussion about the equitable authority of the federal courts applies with equal force to all claims brought directly under the Supremacy Clause to enjoin state laws that are inconsistent with federal statutes. Yet California contends that federal statutes adopted under the Spending Clause are different. According to California, "the Supremacy Clause and preemption have no role in a dispute over a state's compliance with a funding condition set forth in a Spending Clause statute," such as the Medicaid Act. Pet. Br. 18, 46-49. These contentions are meritless.

1. California initially submits that the Supremacy Clause never comes into play when Congress legislates pursuant to its spending powers because "[t]he relationship between the federal and state governments in this context is defined *not* by the supremacy of federal law, but by the quasi-contractual agreement between the governments." Pet Br. 18 (emphasis in original), 46-47. But statutes adopted under the spending power carry the same force and authority as statutes enacted under other enumerated powers. This Court, therefore, has used the contract analogy only as an interpretive aid, while "be[ing] careful not to imply that all contract-law rules apply to Spending Clause legislation." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (italics omitted); *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction.").

For purposes of the Supremacy Clause, the Court has never distinguished between laws enacted pursuant to Congress' spending powers and other federal laws, and instead has in numerous decisions held state laws or regulations invalid under the Supremacy Clause because they are inconsistent "with a funding condition set forth in a Spending Clause statute." Pet. Br. 18.[10]

---

[10] *See, e.g., King v. Smith*, 392 U.S. 309, 333 n.34 (1968) ("There is of course no question that the Federal Government . . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."); *Townsend v. Swank*, 404 U.S. 282, 285 (1971) ("We hold that the Illinois statute and regulation conflict with [the Social Security Act] and for that reason are invalid under the Supremacy Clause."); *id.* at 286 ("[A] state eligibility standard that excludes persons eligible for assistance . . . under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."); *California Dep't of Human Res. Dev. v. Java*, (*continued* . . .)

California ignores these precedents, asserting that the Supremacy Clause applies only to "Congress' exercise of power particularly with respect to commerce and treaties – areas in which Congress may exercise exclusive regulatory (i.e. preempting authority)" and that allowing California to defy federal Spending Clause statutes "does not frustrate the national purposes for which the Union was formed." Pet. App. 48-49 & n.18. To the contrary, the Supremacy Clause applies to *all* "Laws of the United States." U.S. Const., Art. VI, cl. 2. Among the "Laws of the United States" are those laws adopted by Congress pursuant to its powers to tax and spend to further the "general Welfare" (U.S. Const., Art. I, §8, cl. 1), which, contrary to California's assertion (Pet. Br. 49 n.18), are

---

(. . . *continued*)
402 U.S. 121, 135 (1971) ("[E]nforcement of [the California statute] must be enjoined because it is inconsistent with . . . the Social Security Act."); *Carleson v. Remillard*, 406 U.S. 598, 601 (1972) ("If California's definition conflicts with the federal criterion [under the Social Security Act] then it . . . is invalid under the Supremacy Clause."); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973) (state law preempted by Social Security Act "by reason of the Supremacy Clause"); *Shea v. Vialpando*, 416 U.S. 251, 266 (1974) (affirming injunction against Colorado welfare regulation that conflicts with Social Security Act); *Philbrook v. Glodgett*, 421 U.S. 707, 719 (1975) (same as to Vermont welfare regulation); *Youakim v. Miller*, 425 U.S. 231, 233 (1976) (per curiam) (remanding for determination of "Supremacy Clause claim" alleging Illinois' regulation was inconsistent with Social Security Act); *Miller v. Youakim*, 440 U.S. 125, 132 (1979) (state law "is inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause"); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) ("Because New York's no-cash and loss-or-theft rules conflict with a valid federal regulation [adopted under the Social Security Act], they are invalid under the Supremacy Clause."); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (inconsistency between state law and Social Security Act "amounts to a 'conflict' under the Supremacy Clause — a conflict that the State cannot win"); *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 292 (2006) (state lien on tort settlements inconsistent with Medicaid Act and therefore invalid).

among the "enumerated powers under the Constitution," no less than the power to "regulate Commerce." U.S. Const., Art. I, §8, cl. 3; *see South Dakota v. Dole*, 483 U. S. 203, 206-207 (1987).

Ongoing state defiance of any valid federal law, moreover, does "frustrate the national purposes for which the Union was formed," regardless of which provision(s) of the Constitution authorized Congress to adopt that law. As the Court explained in *Green v. Mansour*, 474 U.S. 64 (1985) – a Spending Clause case – "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68.

The Court also recognized in *Lawrence County*, 469 U.S. at 259 n.6, that a claim that a state law is preempted by a federal statute adopted under Congress' Spending Clause authority states a federal claim under the same rationale applied in *Shaw*. *Lawrence County* held that a state law regulating the distribution of funds that local government units receive from the federal government was preempted by the Payment in Lieu of Taxes Act, 31 U.S.C. §6901 *et seq.*, which granted localities the authority to make their own decisions about the use of federal funds. The Eighth Circuit had vacated a judgment for the plaintiff county in its federal court preemption injunction action based on the court's determination that the plaintiff did not "affirmatively assert[] a federal claim." *Lawrence County v. South Dakota*, 668 F.2d 27, 30-31 (8th Cir. 1982). Relying on *Shaw*, this Court recognized that "[t]his ruling was erroneous." *Lawrence County*, 469 U.S. at 259 n.6. The Supremacy Clause claim here is indistinguishable from the federal court claim in *Lawrence County*.

2. California next contends – again without acknowledging 40 years of contrary precedent (*see supra* n.10) – that "the Supremacy Clause cannot be used to 'invalidate' or declare 'null and void'" a state law preempted by the Medicaid Act, because state participation in the Medicaid program is *voluntary*. Pet. Br. 47-48. But it does not follow from California's freedom to refrain from participating in Medicaid that the courts cannot enjoin its officials from implementing a state law contrary to the Medicaid Act while the State does participate in that program.

For example, the Civil Rights Act of 1964 requires the owner of any "inn, hotel, motel or other establishment which provides lodging to transient guests" to offer lodging to all on non-discriminatory grounds. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). It does not require anyone to open a hotel or forbid anyone from exiting the hotel business. Yet a prospective injunction would be an appropriate remedy to prevent the continuing violation of federal law by a defendant who is operating a hotel. *See id.* at 242, 244-45.

The Court recognized in *King v. Smith* – a Spending Clause case – that "States are not required to participate in the [federal] program" (392 U.S. at 316), but held an Alabama "regulation . . . invalid because it defines 'parent' in a manner that is inconsistent with . . . the Social Security Act." *Id.* at 333; *see also Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (plurality opinion) ("[A] court may identify the violation and enjoin its continuance . . . [;] the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989) (recognizing that the State in Spending Clause preemption cases could "relieve itself of federal obligations by declining federal funds").

3. This Court also long ago rejected California's argument (Pet. Br. 47-48) that Congress' authorization of a withholding-of-federal-funds administrative remedy as part of Spending Clause programs established by the Social Security Act (which include the Medicaid program) demonstrates that Congress intended to strip the courts of their "traditional jurisdiction" to enjoin enforcement of state laws that are invalid under the Supremacy Clause. *See Rosado v. Wyman*, 397 U.S. 397, 420 (1970) ("We adhere to *King v. Smith*, 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief.").

Even if Congress *could* have established the Medicaid program differently, it did not do so. This Court interpreted the pertinent statutes many decades ago and found "*not the slightest indication* that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." *Rosado*, 397 U.S. at 422 (emphasis added). The United States agrees. U.S. Br. 32 n.12 ("The United States is *not* suggesting that Congress has 'displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*.'") (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)) (emphasis added; further internal quotations and citations omitted).

Congress' adoption of the so-called "*Suter*-fix" amendments to the Medicaid Act in 1994 ratified the interpretation of the statute that California now asks the Court to reject. The 1994 amendments were adopted after this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), which held that a provision of the Medicaid Act did not secure individual "rights" within the meaning of §1983 because, among other things, the provision concerned the

contents of a state plan. Congress responded by amending the Medicaid Act to provide, in pertinent part, that "[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §1320a-2; *see also id.* §1320a-10 (same language). This amendment cannot be reconciled with California's proposed interpretation of the Medicaid Act, under which the statutory requirements for a state plan are simply judicially unenforceable administrative provisions to guide continued funding decisions.

Congress also has amended the Medicaid Act many times after *Rosado* without changing the statutory structure to make the administrative remedy exclusive. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983) (in light of "well-established judicial interpretation" permitting suits under §10(b) of Securities Exchange Act of 1934 "regardless of the availability of express remedies," Congress' decision when amending the securities laws in 1975 "to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action").[11]

In light of the particular judicial history of the Social Security Act, even if the Court wished to give notice that it would henceforth view the existence of a withholding-of-funds remedy in new Spending Clause statutes as indicative of an intent to withdraw the traditional author-

---

[11] Contrary to California's contention (Pet. Br. 31-33), Congress' 1997 amendment repealing the Medicaid Act provision at issue in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) – the Boren amendment – has no bearing on this case. Congress' repeal of the Boren Amendment meant that participating states were no longer required to comply with that provision. Congress therefore did not address the availability of private litigation to enforce the Boren Amendment, much less as a general matter.

ity of the federal courts to entertain Supremacy Clause injunction actions, it would betray Congress' reliance on prior Court decisions to apply such a rule here. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring) (explaining that while Congress was now on notice that Court would be reluctant in future to imply statutory causes of action, Court would not apply that rule retroactively because "we do not write on an entirely clean slate," and Congress had relied on prior interpretations of law).

4. Finally, there is no tension between the Court's reasoning in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and injunctions under the Supremacy Clause to prohibit enforcement of state laws that are inconsistent with Spending Clause statutes.

Pennhurst held only that obligations imposed upon participating states by federal spending power programs must be imposed "unambiguously" so participating states are "voluntarily and knowingly" undertaking those obligations. *Id.* at 17. This "clear notice" rule governs whether an obligation exists at all. That is, absent "clear notice," a purported obligation in a Spending Clause statute would be neither enforceable administratively by the federal government nor through private lawsuits. *See South Dakota v. Dole*, 483 U.S. 203, 207-209 (1987) (discussing "clear notice" requirement as basic limitation on federal spending power and applying it to case involving federal withholding-of-funds remedy, not private enforcement).

When a participating state does have "clear notice" of an obligation imposed by federal law, however, a prospective injunction to preclude implementation of a state law that conflicts with the federal statute serves only to hold the state to the "deal" that the state "voluntarily and knowingly" accepts. *Cf. Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007) ("Our determination that

IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe."); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (Congress need not warn in advance of "the remedies available against a noncomplying California"). While California might prefer that enforcement be limited to the ineffectual threat of withholding of funds by an overburdened federal agency, it does not have a legitimate interest in continuing to implement a preempted law. Moreover, a court ruling that a state law is preempted allows the state the option to withdraw from the federal program if it wishes to avoid the prospective injunction, or to "voluntarily and knowingly" continue its participation. *See supra* at 24.

California seeks to smuggle into this case the issue whether its state statute was in fact in conflict with 42 U.S.C. §1396a(a)(30)(A) by suggesting that §30(A) is too "nebulous" to provide a judicially enforceable standard. But the lower courts disagreed with California, and this Court denied certiorari on the question whether §30(A) preempts the state statute. The Court must therefore take as a given in this case that §30(A) provides sufficiently clear notice to impose an obligation under *Pennhurst*, and that California officials sought to defy federal law by implementing a state statute that is void under the Supremacy Clause.

III. THE COURT'S JURISPRUDENCE REGARDING 42 U.S.C. §1983 CLAIMS AND STATUTORY RIGHTS OF ACTION DOES NOT APPLY TO PROHIBITORY INJUNCTIONS SOUGHT DIRECTLY UNDER THE CONSTITUTION

A. Section 1983 claims and preemption injunction actions to enforce the Supremacy Clause are substantively, historically, and practically distinct

This Court's jurisprudence regarding whether statutes create individual "rights" enforceable under §1983 is simply not relevant to suits for prospective injunctive relief directly under the Supremacy Clause. California acknowledges that this Court has approved of injunctive relief against implementation of state laws preempted by federal statutes without relying on "rights" enforceable under *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Pet. Br. 43-44 & n.15. This Court has consistently recognized that the unavailability of a claim under §1983 does not exclude traditional injunctive relief to enforce the Constitution.[12] That is equally true of suits to enforce the Constitution's Supremacy Clause. *See Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting) (even where §1983

---

[12] *Compare Carter v. Greenhow*, 114 U.S. 317, 322-323 (1885) (holding that Contracts Clause did not "secure" rights enforceable through §1983, but noting that Congress "has legislated in aid of the rights secured by that clause of the constitution . . . by conferring jurisdiction upon the [lower federal] courts . . . of all cases arising under the constitution and laws of the United States"), *with White v. Greenhow*, 114 U.S. 307, 308 (1885) (permitting suit to enforce Contracts Clause to proceed under federal jurisdiction statute); *see also Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) (suit could not be brought under §1983, but "[i]f state legislation impairs the obligations of a contract . . . remedies are found in [what is now 28 U.S.C. §1331], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States").

damages claims are unavailable, plaintiffs "may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes").

Equitable suits to enjoin allegedly unconstitutional state laws, including suits to enforce the Supremacy Clause, were available long before Congress adopted what is now §1983. *See supra* at 7-8, 16. By enacting the provision that became §1983, Congress provided private litigants previously unavailable remedies, broadened the range of conduct by public officials that could be challenged by injured individuals as violating their federal rights, and expanded the jurisdiction of the federal courts. This Court's recognition of limits on this statutory expansion in *Gonzaga* and its progeny, based on the particular statutory text and purpose of §1983, does not affect the pre-existing authority of the federal courts to hear claims for injunctive relief directly under the Supremacy Clause.[15]

1. Section 1983 expanded the remedies available to private litigants. The sole remedies available for equitable claims under the Supremacy Clause are injunctive and declaratory relief against the operation of the preempted state law. By contrast, §1983 provides for damages, including punitive damages. *See Carlson v. Green*, 446 U.S. 14, 22 (1980).

When it was first adopted in 1871, supporters of the provision that became §1983 confirmed their intent to provide for monetary relief. *See, e.g.*, Cong. Globe, 42d

---

[15] California's reliance on *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1345 (2011) (Pet. Br. 34), is misplaced. *Astra* did not involve either the Supremacy Clause or §1983, and, as discussed in the text, Supremacy Clause injunction actions predate and are distinct from §1983 claims.

Cong., 1st Sess. App. 477 (1871) (statement of Rep. Dawes) (provision meant to protect "every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution" by "giving him a civil remedy in the United States courts for any damage sustained in that regard"); *id.* at App. 446 (statement of Rep. Butler) (pointing to the kinds of rights violations the provision was meant to address by insisting that "[n]o other nation on earth would permit its citizens to be thus tortured and murdered and its officers stricken down defenseless and unavenged," but would demand "reparation" and ensure that "full indemnity is made" by those responsible).

Opponents similarly complained that the provision that became §1983 "'gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a *civil action for damages* against the wrongdoer in the Federal courts,'" and lamented the "'mercenary considerations'" this expansion of remedies was likely to foster. *Monroe v. Pape*, 365 U.S.167, 178 (1961) (quoting Cong. Globe, 42d Cong., 1st Sess. App. 50 (1871) (statement of Rep. Kerr)) (emphasis added); *see also* Cong. Globe, 42d Cong., 1st Sess. App. 365-66 (1871) (statement of Rep. Arthur) (decrying possibility that state officials would be subjected to "heavy damages and amercements"); *id.* at App. 385 (statement of Rep. Lewis) (objecting that provision makes state judges "liable to a suit in the Federal court and *subject to damages*" and "a ministerial officer is subject to the same pains and penalties") (emphasis added).

This Court's §1983 jurisprudence has largely been an explication of the various contexts in which damages and other enhanced remedies (which now include attorney's fees, *see* 42 U.S.C. §1988(b)) are available. *See, e.g.*, *Gonzaga*, 536 U.S. at 276 ("The question presented is

whether a student may sue a private university for [compensatory and punitive] damages" under §1983, to enforce provisions of particular federal statute). In contrast, the issue before this Court now concerns the availability of traditional equitable relief."

2. Section 1983 also provides a cause of action to challenge state violations of federal rights that could not be challenged in a traditional suit to enforce the Supremacy Clause.

The Supremacy Clause provides that federal law is supreme over "any Thing in the Constitution or Laws of any State." U.S. Const., Art. VI, cl. 2. It thus preempts – *i.e.*, nullifies or voids – state and local laws and regulations that conflict with or frustrate the objectives of federal law. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress . . . .'") (quoting *Gibbons v.*

" Amicus National Governors Association points out that some members of the Congress that enacted in 1871 the legislation now codified as §1983 believed it provided "new" equitable remedies in federal court. Nat'l Govs. Ass'n Br. 29 (italics omitted). Section 1983 did provide for *some* equitable remedies not previously available in federal court, both by expanding the kinds of state action that could be challenged by private litigants, *see infra* at 33, and by providing that suits pursuant to its provisions were "to be prosecuted in the several district or circuit courts of the United States" (Ku Klux Act of April 20, 1871, ch. 22, §1, 17 Stat. 13), thus greatly expanding the federal courts' jurisdiction, which had previously generally been limited to cases in diversity, *see supra* n.2. The Congress that enacted what is now §1983 also fully understood that preemption injunction actions to enforce the Constitution were previously available where the courts had jurisdiction. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 420 (1871) (statement of Rep. Bright); *Osborn*, 22 U.S. 738.

Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (preempted state law is "unconstitutional and void"). A cause of action to enforce the Supremacy Clause is thus only available to challenge state or local statutes, regulations, ordinances, or policies with the force of *law*.

By contrast, §1983 authorizes challenges not only to state laws, but also to deprivations of rights, privileges, or immunities by individual actions or failures to act by state officials "under color of" law, even when those actions or failures to act *violate* state or local law. *Monroe*, 365 U.S. at 172 (§1983 provides remedy for rights violations caused "by an official's abuse of his position," even if official violated state law). Section 1983 thus provides a mechanism for challenging a broad range of state and local action or inaction that does not have the force of law. *See, e.g., id.* (warrantless search and arrest); *Wilson v. Garcia*, 471 U.S. 261 (1985) (police beating). The Supremacy Clause does not reach so far – which was among the reasons why Congress felt the need to enact §1983. *See Monroe*, 365 U.S. at 172-83 (discussing legislative history).[15]

---

[15] The United States points to *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), as cases "in considerable tension" with the availability of preemption injunction actions to enforce the Supremacy Clause. U.S. Br. 26-27. But those cases involved challenges to state executive branch *actions or failures to act*, not, as here, preemption challenges to the enforcement of state *laws or regulations*. *See Blessing*, 520 U.S. at 337, 345-46; *Suter*, 503 U.S. at 352. The parties in *Blessing* and *Suter* did not brief the possibility that plaintiffs' challenges could proceed under the Supremacy Clause, and thus the Court did not need to reach the question whether the actions challenged in those cases or any other state executive actions may amount to state "laws" subject to challenge under the Supremacy Clause. *Cf.* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-69, 375 (2004) (discussing Court's disparate approaches to challenges to state legislative and executive actions alleged to conflict with federal law).

3. The limitations this Court has applied to §1983 claims stem from the specific language of §1983, which applies to deprivations of "*rights, privileges, or immunities* secured by the Constitution and laws" of the United States. (Emphasis added.) *See Golden State*, 493 U.S. at 106 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law.").

By contrast, the Supremacy Clause makes no reference to "rights." Rather, it declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. While the *Gonzaga* Court's focus on rights-creating statutory language in the context of §1983 follows from the text of §1983 itself, a similar analysis does not follow from the language of the Supremacy Clause, which focuses on the relationship between state and federal laws. *See Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) (in contrast to §1983, "[p]re-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals").[18]

B. Implied statutory rights of action are distinct from injunction actions to enforce the Supremacy Clause

This Court's implied statutory right of action jurisprudence is similarly inapplicable to suits to enforce the

---

[18] The United States places undue reliance on *Maine v. Thiboutot*, 448 U.S. 1 (1980). U.S. Br. 28-29. The Court in *Thiboutot* stated only that, in previous cases involving the Social Security Act (SSA), §1983 was "the exclusive *statutory* cause of action because . . . the SSA affords no private right of action against a State." 448 US. at 6 (emphasis added). The parties in *Thiboutot* did not brief the availability of a direct cause of action under the Supremacy Clause for injunctive relief. The *Thiboutot* Court also included, in a compilation of prior decisions, some cases that under *Gonzaga* could not be brought under §1983.

Constitution, including injunctive suits to enforce the Supremacy Clause.

Statutory rights of action, like §1983 claims and unlike Supremacy Clause injunction actions, permit both damages suits and challenges to actions or inactions that do not have the force of law. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 65-66 (1992) (damages suit alleging sexual harassment, explaining that, where Court finds implied statutory right of action, it "presume[s] the availability of all appropriate remedies [including damages] unless Congress has expressly indicated otherwise").

And implied statutory actions go even further than §1983 claims, permitting suits against private defendants for entirely private action. *Cf. Building. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229 (1993) ("[T]he Supremacy Clause does not require pre-emption of private conduct."). The Court's implied statutory right of action jurisprudence has developed primarily in the context of suits against private parties for damages – a broad category of cases all sharing no tie to the Supremacy Clause. *See, e.g., Cort v. Ash*, 422 U.S. 66, 68 (1975) (shareholder derivative suit for damages against corporate directors).[17] This line of authority does not gov-

---

[17] *See also Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869, 2875-76 & n.1, 2881 n.5 (2010) (foreign investors' securities fraud damages suit against foreign banking corporation); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 152-53, 164-65 (2008) (investors' securities fraud damages suit against corporation); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167-68 (1994) (bondholder's securities fraud damages suit against indenture trustee); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 288 (1993) (action for con-

(*continued* . . .)

ern this case, which just involves traditional equitable relief against government officials directly under the Constitution.

Even in cases involving public defendants, the statutes at issue in this Court's implied statutory right of action holdings applied to private actors as well, so the Court's conclusion also decided whether the statute created an implied right of action against private defendants. For example, in

---

(. . . *continued*)
tribution by stock issuers against attorneys and accountants); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1086-88 (1991) (minority shareholders' damages action against corporation and directors); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 529, 532-33 (1989) (damages suit against union); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136, 145-48 (1985) (beneficiary's damages suit against employee benefit plan fiduciary); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 525-26, 534-36 (1984) (shareholder derivative damages suit against investment company); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377-80 (1983) (securities fraud damages suit against accounting firm); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632-33, 639-40 (1981) (suit for contribution against concrete firms); *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 82, 91-95 (1981) (employer's suit for contribution against union); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 762-64, 770-73 (1981) (employee's damages suit against university consortium); *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 13-16, 19-24 (1979) (shareholder derivative damages suit against investment adviser); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562, 568-71 (1979) (damages suit against accounting firm); *Cannon v. University of Chicago*, 441 U.S. 677, 680 n.1, 688-709 (1979) (damages suit against private universities); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 466-68, 477-80 (1977) (minority shareholders' securities fraud damages suit); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 4, 9-10, 21, 24, 37-41 (1977) (damages action against competitor in corporate takeover contest); *cf. Astra*, 131 S.Ct. at 1345, 1347 (third-party-beneficiary damages suit against pharmaceutical companies alleging contract breach substantively identical to suit pursuant to implied statutory right of action).

Alexander v. Sandoval, 532 U.S. 275 (2001), although the defendant was a state official, the federal regulations that the plaintiffs alleged the official had violated were authorized by a federal statute (Title VI) that also covered conduct by private parties. *See also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (environmental statutes that reached private conduct); *California v. Sierra Club*, 451 U.S. 287 (1981) (same).[18] Had the Court concluded that the statutes or regulations in these cases provided for an implied right of action, the holding would have permitted suits against private defendants. In contrast, Supremacy Clause actions by definition are only available to prevent public officials from implementing preempted state laws.

The Court's modern approach to implied statutory rights of action stems from a concern that permitting suits in federal court where Congress has not authorized them "runs contrary to the established principle that [t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008) (quoting *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting)) (internal quotation marks and citations omitted). The long-established availability of preemption injunction suits to enforce the Supremacy Clause is fully consistent with these principles. Congress authorized the federal courts to exercise their traditional equitable authority, so long as the dispute otherwise fell within the limits of the court's jurisdiction. *Supra* at 15-17.

---

[18] *Sandoval*, *Sea Clammers*, and *Sierra Club* all also involved challenges to state executive branch actions, not legislatively enacted laws. *See supra* n.15.

IV. CALIFORNIA'S PROPOSED LIMITATION ON SUPREMACY CLAUSE ACTIONS FOR PROHIBITORY INJUNCTIONS IS NOT SUPPORTED BY HISTORY, LOGIC, OR PRECEDENT

California urges that, if the Court recognizes any federal court authority to issue equitable relief directly under the Supremacy Clause, it should limit that authority to cases in which preemption is asserted as a sort of anticipatory defense, to forestall enforcement of state or local regulation. Pet. Br. 42-44. The case law does not support this limitation, and imposing it for the first time now would undermine the purpose of the Supremacy Clause.

As an initial matter, California is wrong that *Shaw* and other preemption cases that arose directly under the Supremacy Clause would still be viable §1983 cases were this Court to eliminate the Supremacy Clause injunction cause of action, because they involve individual "rights." Pet. Br. 42-43 & n.12. These cases involve statutes that do not contain the "rights-creating language" that this Court has deemed "critical." *Gonzaga*, 536 U.S. at 283-84 & n.3, 287.

ERISA's preemption provision, for example, simply states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" (29 U.S.C. §1144(a)), and does not contain statutory language that would support recognition of any "right" under §1983.

Likewise, the National Labor Relations Act ("NLRA") does not contain any "rights-creating" language that would apply to employers. In contending otherwise, California relies on authority that predates *Gonzaga*, and thus reached a different result than would be required under current authority. *See Golden State*, 493 U.S. at 451 (acknowledging absence of statutory text securing "rights" under NLRA, but holding right to be free from regulation to be "implicit"). Moreover, even if it could

somehow be said that the NLRA, *sub silentio*, grants businesses a *Gonzaga*-type "right" to be free from regulation, it is implausible that the NLRA could be read also to grant a "right" to wrong-doers to avoid "supplemental sanction" for conduct concededly subject to federal prohibition and penalty, which was the issue in *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 283-84, 287-88 (1986) (state statute prohibiting state purchases of products from repeat NLRA violators preempted in injunctive suit brought by employer because statute imposed supplemental sanction on conduct regulated exclusively by federal government).

This would be equally true of the many federal statutes that, like the NLRA, contain *no* preemption language at all, much less rights-creating language, but have been held in preemption injunction suits to preempt state regulation. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (Federal Aviation Act and Noise Control Act preempted city ordinance regulating aircraft noise based on "pervasive nature of the scheme of federal regulation of aircraft noise," despite absence of express preemption provision); *Hines v. Davidowitz*, 312 U.S. 52, 68-74 (1941) (state alien registration law preempted by Federal Alien Registration Act).

Having established that preemption cases could not simply be brought under §1983, we turn to California's "anticipatory defense" theory.

A. The Court's preemption cases cannot be explained as all involving anticipatory defenses to state regulation or quasi-regulation

1. California's theory is that, even if no statutory "cause of action" is necessary to obtain injunctive relief under the Supremacy Clause, this Court has entertained preemption claims absent such a statutory cause of action only when

asserted in anticipation of state proceedings to enforce regulation of a plaintiff's conduct. Pet. Br. 43-44; *see also* U.S. Br. 19, 21-22; Nat'l Govs. Ass'n Br. 23-26. Initially, regardless of the truth of this proposition as a descriptive matter, no party or amicus offers a reasoned justification for limiting the force of the Supremacy Clause to this context.

Historical practice at the time the Supremacy Clause was adopted lends no support, for while traditional equity suits did include those to enjoin actions at law (as amici correctly point out, Nat'l Govs. Ass'n Br. 23-25), they were not limited to such cases.[19] Early authorities on injunctive relief noted that "[i]t would indeed be difficult to enumerate" all the categories of cases in which injunctions were available,

---

[19] As previously discussed (*supra* at 12-15), suits seeking injunctive relief were generally available to prevent unlawful injury where there was no adequate remedy at law, including to redress or prevent injury from statutory violations. *E.g.*, *Bosanquett v. Dashwood, Forrester*, 39-40 (Ch. 1734) (suit in equity for refund based on usury statute where no action at law was available; "tho' a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them"); *see also* 1 John Fonblanque, *A Treatise of Equity*, ch. 1, §3, pp. 13-15 (1793) ("Every matter . . . that happens inconsistent with the design of the legislator . . . may find relief" in equity); 1 Story § 10. Injunctive relief was also available, for example, (a) to enforce trust obligations, *e.g.*, *Attorney General v. Heelis*, 2 Simons & Stuart 67 (Ch. 1824) (commissioners appointed under act of Parliament to provide local public services held to be equivalent of trustees subject to injunction to administer funds as required by statute); *see generally* 1 Pomeroy §§151-55; (b) to prevent waste, *e.g.*, *Portues v. Tapham*, Case No. 30, *Registrar's Book of Governor Keith's Court of Chancery* (Pa. 1735); *Wightman v. Brown*, 1 S.C. Eq. Rep. 166 (1790); *Attorney General v. Mayor &c. of Dublin*, 1 Bligh 312, 324, 339 (H.L. 1827) (where water users brought suit to restrain levies by corporation of Dublin allegedly "not warranted" by statute permitting rebuilding and maintenance of water pipes, Lord Redesdale (previously John Mitford) held suit in equity proper because it "was necessary to enforce the proper application of the funds [as required by statute], and was in the nature of an injunction to

(*continued . . .*)

given "the endless variety of cases in which a plaintiff is entitled to equitable relief." Robert Henley Eden, *A Treatise on the Law of Injunctions* 2 (1821); *see also* 1 John Fonblanque, *A Treatise of Equity*, ch. 1, §3, p. 20 (1793) (with respect to jurisdiction of courts of equity, "in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles"). Consistent with these principles, suits to enjoin injurious actions taken by public officials were traditionally available in equity where the plaintiff was not threatened with any enforcement action at law. [39]

(. . . *continued*)
stay waste"); *see also* Mitford at 123-24; (c) to maintain the status quo pending trial, *e.g.*, *Gray v. Yeamans*, *Journal of the Grand Council of South Carolina, 1671-1680* (S.C. 1671) (reprinted in *Records of the Court of Chancery of South Carolina, 1671-1779*, at 57-58 (1950 ed.)); *Burnet v. Corporation of Cincinnati*, 3 Ohio 73, 73 (1827); *see* Mitford at 122-23; (d) to restrain nuisances, *e.g.*, *Hall v. Mason*, Callis, 262 (1621); *Attorney-General v. Forbes*, 2 Mylne & Craig 123, 129-30 (Ch. 1836) (in suit against county magistrates, Chancellor held that "individuals, who conceive themselves aggrieved, may come forward and ask the assistance of the [High] Court [of Chancery], to prevent a public nuisance, from which they have individually sustained damage"); and (e) to avoid a multiplicity of suits, *e.g.*, *How v. Tenants of Bromgrove*, 1 Vernon 22 (Ch. 1681); *Ewelme Hospital v. Andover*, 1 Vernon 266, 267 (Ch. 1684); Mitford at 127-28; *see generally* 1 Pomeroy §§243-75. This list is far from exhaustive.

[39] *See, e.g.*, *Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (injunction to prevent turnpike commissioners from digging on land leased by plaintiff); *Gardner v. Trustees of Village of Newbury*, 2 Johns. Ch. Rep. 162 (N.Y. Ch. 1816) (injunction against village trustees' diversion of stream running through plaintiff's land); *Rankin v. Huskisson*, 4 Simons 13 (Ch. 1830) (injunction prohibiting construction of buildings by Commissioners of Woods and Forests); *Belknap v.*
(continued . . .)

Moreover, the proposed limitation also is not accurate as a descriptive matter. This Court has routinely authorized Supremacy Clause preemption injunctions when the plaintiffs faced no possible threat of enforcement or regulatory proceedings. In *Foster v. Love*, 522 U.S. 67, 68-69, 74 (1997), for example, this Court held a state open primary law that would have permitted election of congressional representatives in October to be preempted by the federal statute establishing a uniform date for federal elections. *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state law restricting state purchases from companies doing business with Burma preempted because threatens to frustrate federal statutory objectives); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476-78 (1996) (state law prohibiting use of funds for abortions challenged as preempted by Hyde Amendment); *Gould*, 475 U.S. at 283-84 & nn.1-2 (state statute prohibiting state purchases of products from repeat NLRA violators preempted); *Perez v. Campbell*, 402 U.S. 637, 641-43, 656 (1971) (Bankruptcy Act preempts state law automatically suspending driver's license for failure to satisfy judgment arising out of car accident that has been discharged in bankruptcy); *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 122-23, 135 (1971) (state law regarding timing of unemployment insurance suspension inconsistent with

---

(. . . *continued*)
Belknap, 2 Johns. Ch. Rep. 463 (N.Y. Ch. 1817) (injunction to prevent canal commissioners from digging ditch that would drain pond and diminish water flow to plaintiff's mill); *Bromley v. Smith*, 1 Simons 8 (Ch. 1826) (injunction suit to prevent local treasurers from misapplying funds in manner inconsistent with act of Parliament); *Cooper v. Alden*, Harrington's Ch. Rep., 72 (Mich. Ch. 1838) (injunction prohibiting local officials from erecting buildings on public streets); *cf. Frewin v. Lewis*, 4 Mylne & Craig 249 (Ch. 1838) (reaching merits in suit to enjoin poor law commissioners from altering workhouse without local officials' consent); *see also supra* at 12-13.

Social Security Act plan provision); *Rosado v. Wyman*, 397 U.S. 397, 407, 415-16 (1970) (state law altering eligibility rules for welfare recipients inconsistent with Social Security Act Amendments of 1967).[21]

2. While California ignores the existence of cases where no enforcement proceedings could occur, the United States, recognizing that California's Supremacy Clause theory does not explain them, argues that cases such as *Crosby* and *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 649-50 (2003) ("*PhRMA*"), fall within another special, heretofore unrecognized, category where direct Supremacy Clause suits are authorized, because they involve, "in effect, [plaintiffs] asserting an immunity" from what were, "in essence, state regulatory requirements" directed at their "primary conduct." U.S. Br. 22-24 & nn.8-9. But even this creative addition to California's theory fails to explain numerous other cases in which this Court has entertained preemption claims involving disputes over government benefits, in which no such quasi-regulation argument could be made.

In *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), for example, the Court commented that, "[u]nlike . . . the main body of

---

[21] Additional cases entertaining such Supremacy Clause preemption injunction actions on the merits include, *e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 248-51, 258-59 (2004); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 649-50 (2003) ("*PhRMA*"); *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 319, 331-34 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 649-50, 668 (1995); *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 222, 232-33 (1993); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 525, 545-46 (1979).

labor pre-emption cases, the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public." *Id.* at 532. Nonetheless, the Court entertained (and rejected on the merits) the employer's contention that the payment of benefits to striking employees was preempted by the NLRA and Social Security Act. *Id.* at 525, 529, 545-46; *see also Dalton*, 516 U.S. at 477-78 (Medicaid providers challenged state constitutional provision prohibiting use of funds for abortions in circumstances where Medicaid funding was authorized by Hyde Amendment); *Java*, 402 U.S. at 122-23, 135 (claimants challenged state law regarding timing of unemployment insurance suspension); *Rosado*, 397 U.S. at 407, 415-16 (welfare recipients challenged state law altering method of computing benefits).

The United States' novel attempt to carve out the cases presently before the Court also ignores this Court's decisions involving Supremacy Clause preemption challenges to state laws governing elections and other government practices that do not seek to regulate private conduct. In *Foster v. Love*, for example, the Court unanimously held that a Louisiana open primary law that permitted federal candidates to win election in October was preempted by the federal act establishing a uniform date for federal elections, in a challenge brought by Louisiana voters. 522 U.S. at 68-69, 74. And as previously discussed (*supra* at 9, 23), this Court stated in *Lawrence County* that a pre-emption challenge to a state law governing local governments' distribution of federal funds was cognizable in federal court. 469 U.S. at 259 n.6.

The United States also offers no legal or historical justification for its proposed distinction. No language in *Crosby*, *PhRMA*, or other relevant decisions explains that

preemption injunction actions under the Supremacy Clause are available only where the state action at issue "in essence" regulates private conduct. Rather, the decisions focus on the injury to or interference with federal interests that results from operation of the preempted state law. In *Crosby*, for example, this Court explained, "We will find preemption where . . . under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 530 U.S. at 372-73 (internal brackets and quotations omitted). The Court held the law invalid because, by imposing different economic pressure on Burma from that adopted by Congress, it undermined presidential authority and presented an obstacle to congressional purposes. *Id.* at 368, 373-74, 376, 378-82, 385.

Similarly, in *PhRMA*, the seven Justices who reached the merits of the preemption claim did not focus on whether an objective of the challenged program was to affect drug companies' conduct outside the Medicaid program. Rather, they disputed whether the curtailment of benefits through the preauthorization requirement would serve Medicaid-related goals, with the plurality concluding that it did and the concurrence/dissent reasoning that it would undermine congressional purposes to "burden Medicaid beneficiaries without serving a Medicaid goal." *Compare PhRMA*, 538 U.S. at 662-66 (plurality opinion), *with id.* at 684-87 (O'Connor, J., concurring in part and dissenting in part) (program preempted because not tailored to further Medicaid-related purpose and poses obstacle to purposes of Medicaid Act). *PhRMA*, *Crosby*, and similar cases are not distinguishable from this case in any relevant respect. At bottom, these cases all involve Supremacy Clause claims to enjoin allegedly preempted state laws affecting access to government benefits.

B. Recognition of California's proposed new limitation on preemption actions would undermine the purposes of the Supremacy Clause

The United States recognizes that preemption injunction actions "serve[] an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 n.7. That purpose is implicated here, and would be ill-served by a rule that permitted States to defy federal law in ways that injure private persons while leaving those persons no legal recourse for asserting the supremacy of federal law.

If anything, the availability of private litigation to vindicate the supremacy of federal law is *more* important when no enforcement action could be brought. That is because a plaintiff who can raise a preemption defense will at least at some point be able to assert the supremacy of federal law and have the preemption issue adjudicated. A plaintiff who will face no enforcement action, by contrast, will simply lose benefits, be forced to vote in an unlawful election, or otherwise be injured by implementation of a preempted (and therefore void) state law. *See, e.g.*, *Foster*, 522 U.S. at 68-69, 74 (voters faced with unlawful early federal election); *Golden State*, 493 U.S. at 111-12 (employer faced with nonrenewal of taxi cab franchise in a case that could not, post-*Gonzaga*, be filed under §1983); *Gould*, 475 U.S. at 283-84 & nn.1-2 (employer faced with denial of state government contracts). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Absent prohibitory injunctive relief, a state can continue to implement a state law that conflicts with federal law, the Supremacy Clause notwithstanding.

V. CALIFORNIA WAIVED ITS PRUDENTIAL STANDING ARGUMENT, WHICH IS ALSO MERITLESS

California's tacked-on prudential standing challenge should be rejected. The *Dominguez* plaintiffs' Article III standing is not disputed; nor could it be. Absent an injunction, the challenged state statute would have caused the beneficiary plaintiffs to lose health care services and reduced payments to the provider members of the plaintiff associations. Pet. App. (No. 09-1158) 81-82, 172-74.[22] Prudential standing is not jurisdictional, and California does not claim to have challenged at any stage below the *Dominguez* plaintiffs' prudential standing. Pet. Br. 50 & n.19. Nor did California raise prudential standing in its certiorari petition. Under such circumstances, this Court should not reach the issue. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).[23]

In any event, a prudential standing challenge would be meritless. Respondents do not seek to assert the "rights" of the federal government; rather, Respondents raise a preemption injunction cause of action under the Supremacy Clause based on the injury that California's

---

[22] Amicus APA Watch confuses the constitutional and prudential standing inquiries. Moreover, Respondents do not rely on a third-party beneficiary theory of relief here, or sue under a statutory scheme requiring exhaustion of administrative processes, so amicus' arguments are not on point.

[23] Even if prudential standing concerns had been properly raised, when (as here) the court below has ruled on the merits issues and the "applicable constitutional questions have been and continue to be presented vigorously and 'cogently,'" disposition of the case on prudential standing grounds "can serve no functional purpose." *Craig v. Boren*, 429 U.S. 190, 193-94 (1976); *see also Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

preempted enactments would otherwise inflict on them.[24] As this Court has explained, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States" when those laws cause injury, and prudential standing does not prevent suits by individuals who are injured by "governmental action taken in excess of the authority that federalism defines." *Bond*, 131 S.Ct. at 2363-65 (analogizing also to separation-of-powers cases). Such claims "need not depend on the vicarious assertion of a State's [or, in this case, federal government's] constitutional interests . . . ." *Id.* at 2365.[25] California's argument to the contrary would foreclose prudential standing in any case in which plaintiffs assert that a federal statute that lacks rights-creating language nonetheless has preemptive force, thwarting vindication of important Supremacy Clause interests and exposing citizens to continuing harm from illegal government action.[26]

---

[24] California apparently confuses the third-party prudential standing limitation doctrine as requiring plaintiffs to demonstrate a legal "right" within the meaning of §1983 or implied-statutory-right-of-action jurisprudence. Pet. Br. 51. But this Court has recently clarified that "the question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." *Bond*, 131 S.Ct. at, 2362 (internal quotation marks and citations omitted). Respondents claim an injunctive right of action under the Supremacy Clause, and assert claims based on injury to their own interests; any question as to their right to enforce the Supremacy Clause relates to the merits of this case, not prudential standing.

[25] *Bond* also rejects California's argument that plaintiffs who have suffered concrete injury from an unconstitutional statute assert a generalized grievance when challenging that statute. *See* 131 S.Ct. at 2366-67.

[26] Plaintiffs who clearly are not the intended beneficiaries of federal statutes often assert preemption claims. *See, e.g., Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 93-94, 108-09 (1992) (Occupational Safety and Health Act preempts state regulation of

(*continued* . . .)

Finally, even if the appropriate zone-of-interests analysis were to focus on the Medicaid Act rather than the Supremacy Clause, the text of §30(A) makes clear that both Medicaid beneficiaries and providers are among those Congress intended to protect, which is more than necessary to overcome a prudential standing challenge. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (zone-of-interests test "not meant to be especially demanding" and "there need be no indication of congressional purpose to benefit the would-be plaintiff"); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-89, 491-92, 499 (1998) (similar); *cf. Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538, 541, 544 (3d Cir. 2002) (en banc) (Alito, J.).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

STEPHEN P. BERZON
Counsel of Record
SCOTT A. KRONLAND
STACEY M. LEYTON
MATTHEW J. MURRAY
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sberzon@altshulerberzon.com

Counsel for Dominguez Respondents in Case No. 09-1158

July 29, 2011

(. . . *continued*)
hazardous waste site employee training, testing, and licensing, in action brought by trade association of hazardous waste businesses); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 275-79, 291 (1987) (rejecting on merits employers' claim that state statute requiring pregnancy leave is preempted by Title VII as amended by Pregnancy Discrimination Act).

APPENDIX

Examples of Supremacy Clause Cases

Decided By This Court

In the 61 cases listed below, this Court decided claims for injunctive or declaratory relief initially brought in federal court against implementation of a state law on the ground that it conflicted with a federal statute or regulation, and thus was preempted under the Supremacy Clause. Based on our review, the preemption claims in these cases were not brought under 42 U.S.C. §1983; nor does it appear that the federal statutes involved contain the type of "rights-creating" language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). There are numerous additional preemption cases decided by this Court that address Supremacy Clause injunction claims initially brought in state court.

1. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011) (business and civil rights groups sought declaratory and injunctive relief against state statute regulating employment of non-citizens unauthorized to work, claiming preemption by federal Immigration Reform and Control Act)

2. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60 (2008) (reversing denial of declaratory and injunctive relief in employers' action against state statute prohibiting recipients of certain state grants from using state funds to assist, promote, or deter union organizing, finding preemption by federal National Labor Relations Act)

3. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (affirming declaratory and injunctive relief in action by transportation groups against state

statute regulating tobacco shipments, as preempted by Federal Aviation Administration Authorization Act)

4. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (affirming declaratory and injunctive relief in bank's action against state laws governing subsidiaries of nationally chartered banks, as preempted by National Bank Act and related regulations)

5. *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (affirming declaratory relief in action by Medicaid recipient against state statute requiring agency to assert lien in excess of medical expenses paid, as preempted by Medicaid Act)

6. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (vacating Court of Appeals order affirming summary judgment against claims by diesel engine manufacturers, injured by reduced sales, seeking declaratory and injunctive relief against state regulation of vehicle fleets, finding regulations likely preempted at least in part by Clean Air Act, and remanding for lower courts to determine specifically which regulations were preempted)

7. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (pharmaceutical manufacturer association sought injunction against state statute implementing prescription drug rebate program, claiming preemption by federal Medicaid Act)

8. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (HMOs sued for declaratory and injunctive relief against state statute that impaired insurers' discretion to contract selectively with health care providers, claiming ERISA preemption)

9. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (towing company sought

declaratory and injunctive relief against municipal ordinance regulating tow trucks, claiming preemption by federal Interstate Commerce Act)

10. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002) (concluding that doctrine of *Ex parte Young* permits telecommunications company's suit for declaratory and injunctive relief against state commission order requiring payments to competitor, claiming preemption by federal Telecommunications Act of 1996)

11. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (reversing denial of declaratory relief in action by tobacco manufacturers and sellers against state regulations restricting sale and marketing of tobacco products, finding preemption by Federal Cigarette Labeling and Advertising Act)

12. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (affirming summary judgment for association of companies engaged in foreign commerce who sought declaratory and injunctive relief against state statute restricting trade with Burma, finding preemption by federal Foreign Operations, Export Financing, and Related Programs Appropriations Act)

13. *United States v. Locke*, 529 U.S. 89 (2000) (reversing denial of declaratory and injunctive relief in action by trade association of oil tanker operators against state regulations governing tanker operations, finding preemption by federal Ports and Waterways Safety Act)

14. *Foster v. Love*, 522 U.S. 67 (1997) (affirming Court of Appeals order reversing denial of injunction in voters' suit for declaratory and injunctive relief against state primary system, finding preemption by federal election statutes)

15. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (trustees of ERISA-regulated health

plans sought injunction against state tax on medical centers, claiming ERISA preemption)

16. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc.*, 519 U.S. 316 (1997) (contractors sought declaratory relief against state statute limiting payment of wages below prevailing wage rate in public contracts to apprentices in state-approved programs, claiming ERISA preemption)

17. *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (per curiam) (remanding for entry of narrower injunction, in action by Medicaid providers seeking declaratory and injunctive relief against state constitutional amendment prohibiting use of state funds for abortions, as preempted by Social Security Act and Hyde Amendment)

18. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (insurers sought injunction against state statute that imposed surcharges on hospital rates for patients of certain insurance carriers, claiming ERISA preemption)

19. *Building & Const. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993) (organization representing nonunion employers sought declaratory and injunctive relief against provision in state agency's project bid solicitation, claiming preemption by the National Labor Relations Act)

20. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (affirming Court of Appeals reversal of district court denial of injunction in employer's action against District of Columbia statute regulating health care coverage, finding ERISA preemption)

21. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (affirming order of Court of Appeals in action

for declaratory and injunctive relief by trade association against state statute regulating employees handling hazardous waste, finding preemption by Occupational Safety and Health Act and related regulations)

22. *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (affirming declaratory and injunctive relief directed at certain state guidelines governing airfare advertising, as preempted by federal Airline Deregulation Act, in suit by airlines)

23. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (oil refineries and wholesalers sought declaratory and injunctive relief against Puerto Rico agency orders regulating oil prices, claiming preemption by federal Emergency Petroleum Allocation Act)

24. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (affirming declaratory judgment against state statute requiring state approval for natural gas companies to issue securities, finding preemption by federal Natural Gas Act)

25. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (mining corporation sought declaratory and injunctive relief against state permit requirement, claiming preemption by federal Coastal Zone Management Act, other federal land use statutes, and United States Forest Service regulations)

26. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (employer sued for declaratory and injunctive relief against state statute requiring reinstatement of employees after pregnancy leave, claiming preemption by Title VII of the Civil Rights Act of 1964)

27. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (affirming

declaratory and injunctive relief obtained by debarred business against state statute penalizing repeat violators of the National Labor Relations Act (NLRA), as preempted by the NLRA itself)

28. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (operator of plasma centers sought declaratory and injunctive relief against ordinance regulating plasma collection, claiming preemption by Food and Drug Administration regulations)

29. *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) (approving of federal court preemption injunction action and holding state statute regulating distribution of funds preempted by Payment in Lieu of Taxes Act)

30. *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) (union and its president sued for declaratory and injunctive relief against state law regulating unions representing casino employees, claiming preemption by National Labor Relations Act)

31. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (reversing Court of Appeals order that dissolved injunctions and reversed declaratory judgments, in action by cable television operators against state ban on broadcast advertising of alcoholic beverages, finding preemption by Federal Communications Commission regulations)

32. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (affirming in part declaratory and injunctive relief in employers' suit against state law prohibiting pregnancy discrimination in employee benefits plans, finding ERISA preemption)

33. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (utility com-

panies sued for declaratory and injunctive relief against state statute that conditioned construction of nuclear power plants on availability of adequate storage and disposal facilities, claiming preemption by federal Atomic Energy Act and related regulations)

34. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) (corporation sought declaratory and injunctive relief against state securities law, claiming preemption by federal Williams Act)

35. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (employers sued for declaratory and injunctive relief against state statute that provided for unemployment benefits to striking workers, claiming preemption by National Labor Relations Act and Social Security Act)

36. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (automobile manufacturer and franchisees sought declaratory and injunctive relief against state statute requiring agency approval to open new retail dealerships, claiming preemption by Sherman Act)

37. *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (employer sued for declaratory and injunctive relief against state statute imposing pension funding charge on certain employers, claiming preemption by National Labor Relations Act)

38. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (affirming in part declaratory and injunctive relief in tanker vessel operators', owners', and customers' suit against state statute regulating oil tanker design, finding preemption by federal Ports and Waterways Safety Act of 1972)

39. *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977) (affirming declaratory and injunctive relief in federal

license holders' suit against state statute restricting licensing of state fishing vessels to United States citizens and state residents, finding preemption by federal Enrollment and Licensing Act)

40. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (affirming declaratory and injunctive relief in meat processor's and flower millers' suit against state statute and regulation governing labeling of packaged foods, finding preemption by Federal Meat Inspection Act and Fair Packaging and Labeling Act)

41. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (affirming lower court opinion finding plaintiffs entitled to injunction against municipal noise ordinance banning night flights, finding preemption under Federal Aviation Act)

42. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (ship and oil terminal owners and operators and shipping associations sought declaratory and injunctive relief against state statute governing oil spill liability, claiming preemption by Water Quality Improvement Act and Admiralty Extension Act)

43. *Perez v. Campbell*, 402 U.S. 637 (1971) (reversing denial of declaratory and injunctive relief against state statute automatically suspending driver's license based on nonpayment of judgments, finding preemption by Bankruptcy Act)

44. *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121 (1971) (affirming injunction against state statute regarding timing of unemployment insurance benefits suspension pending employer appeals of eligibility determinations, finding preemption by Social Security Act)

45. *Rosado v. Wyman*, 397 U.S. 397 (1970) (remanding for lower court to enter declaratory relief and injunction against state public benefits plan as preempted by Social

Security Act, if state did not timely develop alternate plan)

46. *Railroad Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351 (1967) (reversing denial of declaratory and injunctive relief in motor carrier's suit against city ordinance requiring license to operate commercial vehicles, finding preemption by federal Interstate Commerce Act)

47. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (avocado growers sought declaratory and injunctive relief against state statute governing avocado certification, claiming preemption by Agricultural Adjustment Act and related regulations)

48. *Kesler v. Department of Pub. Safety, Fin. Responsibility Div., Utah*, 369 U.S. 153 (1962) (bankrupt sought declaratory and injunctive relief against state statute revoking motor vehicle license and registration, claiming preemption by Bankruptcy Act)

49. *Campbell v. Hussey*, 368 U.S. 297 (1961) (affirming injunction against state statute requiring that certain strains of tobacco be labeled, finding preemption by Tobacco Inspection Act and implementing regulations, in suit by tobacco auction warehouse owners)

50. *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (affirming injunction in suit against state commission's orders setting natural gas transport rates, finding preemption by Natural Gas Act of 1938)

51. *Parker v. Brown*, 317 U.S. 341 (1943) (raisin producer sued for injunctive relief against state statute requiring diversion of raisins into surplus and stabilization pools, claiming preemption by Sherman Act and Agricultural Marketing Agreement Act of 1937)

52. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (reversing denial of injunction against state statute allowing seizure of food products, finding preemption by federal law governing food inspection, codified in Internal Revenue Code and related regulations)

53. *Hines v. Davidowitz*, 312 U.S. 52 (1941) (affirming injunction against state law requiring non-citizens to register and carry identification, finding preemption by Alien Registration Act of 1940)

54. *Mintz v. Baldwin*, 289 U.S. 346 (1933) (cattle company sought injunction against state order that required certification of disease-free cattle, claiming preemption by federal statute governing shipments from quarantined areas)

55. *Clallam County, Wash. v. United States*, 263 U.S. 341 (1923) (holding for plaintiff corporation in suit seeking decree against state and local tax, finding corporation to be an instrumentality for carrying out war formed under federal Act of July 9, 1918, and thus not subject to state taxation)

56. *Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914) (reversing denial of injunction against state taxation of railroad operating mines on land leased from Choctaw and Chickasaw Indians, finding railroad to be federal instrumentality not subject to taxation under Curtis Act of 1898)

57. *Cummings v. City of Chicago*, 188 U.S. 410 (1903) (landowners sought declaration of rights, and injunction against municipal ordinance requiring permit for dock construction, claiming preemption by River and Harbor Act of March 3, 1899)

58. *Railway Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874) (affirming injunction against county taxation of certain property, as preempted by federal Act of July 2, 1864)

59. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873) (railroad created by federal Act of July 1, 1862 filed bill to restrain county taxation of certain property, claiming preemption by federal Act of July 2, 1864)

60. *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (coal wharves owner sought injunction against state law authorizing construction of bridge over river, claiming preemption by federal Act of February 18, 1793, which authorized vessels enrolled and licensed according to its provisions to engage in coasting trade)

61. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (affirming injunction obtained by Bank of the United States against state tax, finding preemption by federal statute creating the Bank)

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUL 29 2011
OFFICE OF THE CLERK

Nos. 09-958, 09-1158, and 10-283

In The
Supreme Court of the United States

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*,

Respondents.

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*,

Respondents.

TOBY DOUGLAS, Director,
California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *ET AL.*

STANLEY L. FRIEDMAN
445 S. Figueroa St., 27th Fl.
Los Angeles, CA 90071-1631
(213) 629-1500
friedman@friedmanlaw.org

LYNN S. CARMAN*
8 Waterbury Lane
Novato, CA 94949-8239
(415) 927-4023
(415) 499-1687 (fax)
lynnscarman@hotmail.com
**Counsel of Record*

Counsel for Respondents Independent Living Center of Southern California, Inc., et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Supremacy Clause supports an equitable cause of action under the Constitution, to prevent injury to Medicaid beneficiaries and providers, by enjoining state officials to refrain from implementing state legislation that contravenes 42 U.S.C. § 1396a(a)(30)(A) of the federal Medicaid Act.

TABLE OF CONTENTS

Page

PART ONE 1

PROCEEDINGS BELOW 1

THE MEDICAID PROGRAM 2

PROCEDURAL STATEMENT IN RE 09-958 2

Subsequent procedural history in 09-958 4

The home health and NEMT services injunction in 09-958 6

PROCEDURAL STATEMENT IN RE 09-1158 9

The State legislature enacts AB 1183, a five percent payment reduction to pharmacies, to replace AB 5 eff. March 1, 2009: again, for solely budgetary reasons, again, in violation of Section 30A 9

PART TWO 14

A. THE GENERAL HISTORY OF LITIGATION UNDER THE MEDICAID ACT 14

The "pre-1983" period 14

The "§ 1983 period" 16

"Post-1983" Medicaid actions 16

B. THE HISTORY OF SECTION 30A LITIGATION 16

Section 30A 17

TABLE OF CONTENTS – Continued

Page

Congress, with knowledge that Supremacy Clause actions are litigated, has never acted to stop them. This signifies Congressional approval, not disapproval, of Supremacy Clause actions of the sort filed by the ILC plaintiffs in the ILC cases at bar 19

The litigation history of Section 30A shows that it is Medicaid beneficiaries and providers, alone – not the Secretary at all – who customarily vindicate the supremacy of the Medicaid Act 21

PART THREE 22

THE PRIMARY ISSUES OF THESE CASES 22

THE TWO CENTRAL ISSUES OF THESE CASES WERE RAISED, OR JOINED, IN THE FIRST MOTION OF THE ILC PLAINTIFFS FOR A PRELIMINARY INJUNCTION, TO ENJOIN THE DIRECTOR FROM IMPLEMENTING THE PREEMPTED STATE LAW, AB 5, IN 09-958 22

RELIEF REQUESTED IN THE FIRST CAUSE OF ACTION 25

The district court denied preliminary injunction; but was reversed by an appeals court order filed July 11, 2008, followed by an explanatory opinion filed September 17, 2008 (543 F.3d 1050) 27

TABLE OF CONTENTS – Continued

Page

PART FOUR 30

THE DIRECTOR HAS IMPLICITLY CONCEDED THAT HIS FIRST MAJOR OBJECTION TO JURISDICTION AND CAUSE OF ACTION, HAS NO MERIT 30

PART FIVE 31

ARGUMENT 31

THESE CASES ARE ABOUT INJURY 31

The ILC cases are about prevention of injury (i.e., adverse effect upon each of the ILC plaintiffs); and vindication of the federal interest in the supremacy of federal law; not, about "enforcement" of "rights" 31

First, the ILC plaintiffs list some of the many cases in which federal officers have been enjoined, or in which it was stated that injunction was available, to prevent injury from federal officers' acts contrary to supervening federal law 32

Second, the ILC plaintiffs list some of the many cases in which injunctions were issued, or in which it was stated that injunction was available, to prevent injury from State officers contrary to, hence preempted under the Supremacy Clause by, a federal statute 34

Summary of this sub-point 35

TABLE OF CONTENTS – Continued

Page

Bond v. United States, 540 U.S. ___ (2011), resolves many issues in favor of the ILC plaintiffs in 09-958 and 09-1158 36

First 36

Second 37

Third 38

Conclusion 39

The case made by the ILC plaintiffs below, is that the ILC plaintiffs did *not* sue to "enforce" any "federal right" or any "right" enacted by the preempting federal law, Section 30A; but sued to obtain injunctive relief to prevent being injured from the Director implementing two State laws (AB 5 and AB 1183) which were enacted contrary to, hence were preempted under the Supremacy Clause by, a federal law (Section 30A) 39

PART FIVE 41

THERE ARE AT LEAST THREE SUPREMACY CLAUSE CAUSES OF ACTION, ARISING FROM THE PLEADINGS AND MOTIONS OF THE ILC PLAINTIFFS 41

WHAT IS NOT AT ISSUE 41

THE CAUSES OF ACTION WHICH AROSE OUT OF THE FACTS IN EACH OF THE THREE ILC PLAINTIFFS' PRELIMINARY INJUNCTIONS 42

TABLE OF CONTENTS – Continued

Page

FIRST CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158 42

1. The facts pleaded and shown for each of three preliminary injunctions in the ILC cases, established a "pre-emptive" cause of action, respectively, under the Supremacy Clause for an injunction to prevent prospective injury 42

Conclusion 45

In any event, beneficiaries were clearly intended by Congress to be benefitted by the Medicaid Act and by Section 30A; and as such, had a cause of action for an order protecting them from injury caused by the Director's preempted acts 45

Injured providers and beneficiary organizations and member groups also have standing and a pre-emptive cause of action, in a representative capacity, for their patients, clients and members who are beneficiaries 46

Summary 47

SECOND CAUSE OF ACTION ARISING OUT OF THE FACTS IN THE ILC CASES IN 09-958 AND 09-1158 47

Discussion 47

Standing to sue 50

TABLE OF CONTENTS – Continued

Page

THIRD CAUSE OF ACTION THE FEDERALISM CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158 50

A 50

de Toqueville is informative on this subject 52

Summary of this sub-point 53

B 53

Summary 56

The wording of Section 30A clearly prohibited the State from reducing provider payments for purely budgetary reason; and, there is no "vague or amorphous" or "broad and non-specific" language in Section 30A which authorizes the State to reduce Medicaid provider payments for purely budgetary reasons, or counsels against injured beneficiaries or providers defending themselves in court whenever the State cuts provider payments for purely budgetary reasons – in flat and deliberate violation of the quality and equal access clauses of Section 30A 57

Conclusion 59

"Clear statement" is not at issue in the ILC cases, because the injunctions only speak prospectively 59

TABLE OF CONTENTS – Continued

Page

THE DIRECTOR AND THE GOVERNMENT JOIN IN THEIR BRIEFS TO RAISE A DEFAULT DEFENSE WHICH IS WITHOUT MERIT 60

1. The all-inclusive wording of the Supremacy Clause repels the construction proposed by the Director and the Government: that only "pre-enforcement" causes of action exist under the Supremacy Clause 60

2. Supremacy Clause cases include many cases in which the preempted State law does not involve "regulation" of the plaintiff's conduct ... 61

THE CLAIM THAT THE MEDICAID ACT FORECLOSED SUPREMACY CLAUSE SUITS, HAS ALREADY BEEN REJECTED BY THE COURT SEVERAL TIMES 63

THE BRIEF OF THE UNITED STATES (PAGES 31-32), JOINED IN BY THE DIRECTOR, IS ESSENTIALLY A MOTION TO DISMISS THE PENDING ILC CASES IN 09-958, AND 09-1158, ON THE BASIS THAT SECTION 30A FORECLOSES THESE CLAIMS 64

THIS *DE FACTO* REQUEST SHOULD BE DENIED 64

First 65

Second 65

Third 66

CONCLUSION AND PRAYER 67

TABLE OF AUTHORITIES

Page

CASES:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 33, 34, 49, 64

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 32, 33

Arkansas Medical Society, Inc. v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 17

Assn. of Data Proc. Service Org. v. Camp, 397 U.S. 150 (1970) 46, 64

Baltimore & Ohio R. Co., 114 U.S. 311 (1885) 62

Barlow v. Collins, 397 U.S. 159 (1970) 64

Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971) 15

Blessing v. Freestone, 520 U.S. 329 (1997) 26, 32, 63

Board of Liquidation v. McComb, 92 U.S. 531 (1876) 43, 62

Bond v. United States, 540 U.S. ___, 2011 U.S. LEXIS 4558 (2011) 36, 37, 38

Burgio and Campofelice, Inc. v. NYS Dept. of Labor, 107 F.3d 1000 (2d Cir. 1997) 24

Cal. Pharm. v. Maxwell-Jolly, 563 F.3d 847 (9th Cir. 2009) 18

California Hospital Assn. v. Schweiker, 559 F.Supp. 110 (C.D. Cal. 1982) 17

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 28, 35, 49

TABLE OF AUTHORITIES – Continued

Page

Clayworth v. Bonta, 295 F.Supp.2d 1110 (E.D. Cal. 2003) *rev'd*, (9th Cir. 2004).....17, 23, 46

Columbia Broadcasting System v. United States, 316 U.S. 407 (1942).....33

Ex parte Young, 209 U.S. 123 (1908).....*passim*

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).....29, 35, 49

Gade v. Nat'l Solid Wastes Mgmt. Assn., 505 U.S. 86 (1992).....29, 35, 49

Golden State Transit Co. v. Los Angeles, 475 U.S. 609 (1986).....34, 55, 61

Golden State Transit Co. v. Los Angeles, 493 U.S. 103 (1989).....42, 55

Gonzaga University v. Doe, 536 U.S. 273 (2002).....26, 30, 32, 65

Harmony Nursing Home, Inc. v Anderson, 341 F.Supp. 957 (D. Minn. 1972).....15

Hauenstein v. Lynham, 100 U.S. 483 (1880).....62

Hayes v. Stanton, 512 F.2d 133 (7th Cir. 1975).....15

Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997).....28, 35, 38

Illinois Hospital Assn. v. Illinois Dept. of Pub. Aid, 576 F.Supp. 360 (N.D. Ill. 1983).....17

Independent Living Center v. Shewry, 543 F.3d 1047 (9th Cir. 2008).....3, 5, 6, 17, 28

TABLE OF AUTHORITIES – Continued

Page

Independent Living Center v. Shewry, 543 F.3d 1050 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009) 3, 48

Kowalski v. Tesmer, 543 U.S. 125 (2004) 37

Lawrence County v. Lead-Deadwood Sch. Dist. 40-1, 469 U.S. 256 (1985) 28, 35, 49

Maine v. Thibotout, 448 U.S. 1 (1980) 16, 19

Marbury v. Madison, 5 U.S. 137 (1803) 31

Minn. Assn. of Health Care Facilities v. Minn. Dept. of Public Welfare, 602 F.2d 150 (8th Cir. 1979) 15

New York v. United States, 505 U.S. 144 (1992) 51, 52

P.G.&E. v. State Energy Res. Cons. & Dev. Comm., 461 U.S. 190 (1983) 29, 35, 49

Pennsylvania Pharmacists Assn. v. Houstoun, 283 F.3d 531 (3d Cir. 2002) (en banc) 20, 45, 54, 55

Ray v. Atlantic Richfield Co., 436 U.S. 151 (1978) 29, 35, 49

Rosado v. Wyman, 397 U.S. 397 (1970) 63

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 28, 35

Smith v. Vowell, 379 F.Supp. 139 (D. Tex. 1974) 15

Warth v. Seldin, 422 U.S. 490 (1976) 37

Webb v. Aggrey, 447 F.Supp. 17 (W.D. Ohio 1977) 15

TABLE OF AUTHORITIES – Continued

Page

Western Air Lines, Inc. v. Port Authority of New York and New Jersey, 817 F.2d 222 (2d Cir. 1987) 24

Western Pacific Cal. R. v. Southern Pacific Co., 284 U.S. 47 (1931) 31, 34

White v. Beal, 555 F.2d 1146 (3d Cir. 1977) 15

Wilder v. Virginia Hospital Assn., 496 U.S. 498 (1990) 19, 63, 66

Wisconsin Hospital Assn. v. Reivitz, 733 F.2d 1226 (7th Cir. 1984) 17

UNITED STATES CONSTITUTION:

Article III ..... *passim*

Eleventh Amendment 19, 61

Supremacy Clause ..... *passim*

UNITED STATES CODES:

28 U.S.C. § 1331 ..... 28, 38

42 U.S.C. § 1396(a)(30)(A) ..... *passim*

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 16

UNITED STATES ACTS:

Federal Food, Drug, and Cosmetic Act of 1938 ..... 33, 34

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONGRESSIONAL RECORD:

83 Cong. Rec. 7892 (1938) 33

CALIFORNIA STATUTES:

California Welfare & Inst. Code § 14105.19 (2008).....4, 7, 23, 25

California Welfare & Inst. Code § 14105.191 (2009).....9, 10, 12

California Welfare & Inst. Code § 14166.245 .....23, 25

TREATISES:

Democracy in America (1839), de Tocqueville 52

John Harrison, *Ex parte Young,* 60 Stan. L. Rev. 989 (2008) 38, 42

PART ONE

PROCEEDINGS BELOW

The respondents in the two *Independent Living Center* ("ILC") cases in 09-958 and 09-1158 are two disabled Medicaid beneficiaries; three pharmacies who participate in the Medicaid program; and an independent living center and two Gray Panther groups who were the plaintiffs below.[1]

The various providers and organizations who were plaintiffs below, sued on behalf of themselves and for the benefit of the thousands of Medicaid beneficiaries who are their patients, clients, or members, as the case may be.

The respondents in the ILC cases in 09-958 and 09-1158 shall sometimes be referred to, collectively, as the "ILC plaintiffs."

Also, the ILC plaintiffs who are Medicaid beneficiaries, and the Medicaid beneficiaries who are the patients, clients, and members of the other ILC

---

[1] The party respondents filing this brief in 09-958 are Independent Living Center of Southern California, Inc.; Margaret Dowling; Mark Beckwith; Gerald Shapiro, Pharm.D., dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; Tran Pharmacy, Inc.; Gray Panthers of San Francisco; and Gray Panthers of Sacramento.

The party respondents filing this brief in 09-1158 are Independent Living Center of Southern California, Inc.; Gerald Shapiro, dba Uptown Pharmacy & Gift Shoppe; Sharon Steen, dba Central Pharmacy; and Tran Pharmacy, Inc.

plaintiffs, shall sometimes be referred to, collectively, simply as "beneficiaries."

And, the ILC plaintiffs who are pharmacies who serve beneficiaries shall sometimes be referred to as "providers."

THE MEDICAID PROGRAM

The Medicaid Act is a federal-state funded health services program, whose purpose is to enable the poor in this country to have access to the same minimum level of medical care as do the non-poor, called "mainstream medicine."

The Act, and the Medicaid fee-for-service program in California (called "Medi-Cal") are described in other briefs in these consolidated cases; hence need no repeat description in this brief.

PROCEDURAL STATEMENT IN RE 09-958

Since before 2008 a payment schedule ("Base Fee Schedule") has existed in the Medi-Cal program to pay the various providers in the fee-for-services part of the federal-state Medicaid program in California, called "Medi-Cal."

In February 2008 the California Legislature enacted Assembly Bill ("AB 5") which required the Director to withhold ten percent from all payments to

providers in the Medi-Cal fee-for-service program for services on or after July 1, 2008.

A petition for a writ of mandamus was filed by the ILC plaintiffs in state court, under the Supremacy Clause, to prevent injury to the beneficiary and provider plaintiffs, and to the thousands of beneficiaries who are the patients, clients, and members of the plaintiff pharmacies, independent living center, and Gray Panther groups.

The suit was removed by the Director to the federal court.[2] On June 25, 2008, the district court denied the ILC plaintiffs' motion for preliminary injunction to enjoin the Director from implementing AB 5. Joint App. 139, 125-139.

On July 11, 2008, the appeals court reversed;[3] followed by a full opinion on September 17, 2008.[4]

NOTE: This September 17, 2008, opinion became, formally or informally, the law of the case, so as to be the decision upon which all the subsequent rulings in the ILC cases in 09-958 and 09-1158 were based (whether or not the subsequent district court and appeals court decisions make any reference to the

---

[2] Doc. 1 (Joint App. 1).

[3] *Independent Living Center v. Shewry*, 543 F.3d 1047 (9th Cir. 2008).

[4] 09-958 Pet. App. 58-93; also, same decision: 543 F.3d 1050 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009).

initial, controlling, September 17, 2008, appeals court opinion).

Also, this September 17, 2008, decision became, by default, the *ratio decidendi* of all the other cases in 09-1158, which are but followers of the lead case, 09-958.

Subsequent procedural history in 09-958

On August 18, 2008, the district court, on remand, granted the ILC plaintiffs a preliminary injunction to enjoin the Director from implementing the preempted AB 5, including refraining from withholding ten percent from payments to certain providers for services after July 1, 2008.[5]

This was a negative injunction, not an affirmative injunction.

The district court found that AB 5 was enacted, contrary to Section 30A, for purely budgetary reasons,[6] as alleged by the ILC plaintiffs,[7] and that the

---

[5] The August 18, 2008 order provided in relevant part:

"The Court hereby orders the respondent Director . . . to refrain from enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for physicians, dentists, pharmacies, adult day care health care centers, clinics, . . . for services provided on or after July 1, 2008."

09-958 Pet. App. 124, 94-124.

[6] 09-958 Pet. App. 106-108, and 107 n. 10.

beneficiaries and pharmacies who were plaintiffs, and the thousands of beneficiaries who were patients, clients, and members of several of the ILC plaintiffs, would be injured irreparably if preliminary injunction were not granted,[8] as alleged by the ILC plaintiffs.[9]

The declarations of the ILC plaintiff beneficiaries and the plaintiff pharmacies, independent living center, and Gray Panther groups showed the irreparable harm threatened to them as beneficiaries and to the thousands of beneficiaries whom the plaintiff providers serve.[10]

On August 27, 2008, the district court amended the August 18, 2008, order to provide that it not apply retroactively to July 1, 2008.[11]

The appeals court affirmed the August 18, 2008, preliminary injunction, but reversed the subsequent August 27, 2008, order – so that the August 18, 2008,

---

[7] First amended complaint ("FAC"), 09-958; set forth in Pars. 45-46, at Joint App. 109-111.

[8] The irreparable injury to the ILC plaintiffs, and to the thousands of beneficiaries who are the patients, clients, and members of various of the ILC plaintiffs is set forth in detail in the findings. 09-958 Pet. App. 108-120.

[9] Irreparable injury was pleaded in detail in the FAC. Joint App. 99-108, 112.

[10] These declarations, are set forth in the Excerpts of Record as Documents 102, 98, 95, 88, 86, 84, 83, 82, 81, 80, 56, 55, 54, 53, 52, 51, 50, 15, 14, 13, and 1, in *Independent Living Center v. Shewry*, Appeal No. 08-56422, Ninth Circuit.

[11] 09-958 Pet. App. 125-126.

order applied retroactively to July 1, 2008, the operative date of AB 5.

(**NOTE:** This retroactivity of the initial August 18, 2008 preliminary injunction is not challenged before this Court.)[12]

The home health and NEMT services injunction in 09-958

On November 17, 2008, a second negative preliminary injunction was issued in 09-958 which enjoined the Director from implementing AB 5 in respect to home health agencies, and non-emergency medical transporters ("NEMT").

This negative injunction tracked the wording of the initial August 18, 2008, order, except that it was

---

[12] The appeals court found on the cross-appeal by the ILC plaintiffs that the State waived sovereign immunity because (1) the State statute which permits mandamus against State officials for refund of moneys unlawfully withheld, and (2) the Director in removing the 09-958 action to district court, therein waived the State's sovereign immunity in the 09-958 case. See, 09-958 Pet. App. 29-38.

The ILC plaintiffs' position in the district court was, also, that the ILC initial motion was timely and an order would have issued in June, 2008 to restrain implementing AB 5, but for the error invited by the Director; so that the August 18, 2008 order should in equity, and by estoppel, operate *nunc pro tunc* so as to be deemed effective before July 1, 2008. (See Excerpts of Record, Document 12, in *Independent Living Center v. Shewry*, Appeal No. 08-56422, Ninth Circuit.)

only effective from the date of the order, November 17, 2008, prospectively.[13]

The findings again found that AB 5 violated Section 30A, due to being enacted solely for budgetary reasons, 09-958 Pet. App. 144-145.

The district court also found, upon the declarations, that in addition to its findings in the August 18, 2008 order, that as a result of the payment reduction to home health agencies and NEMT transporters, that beneficiaries were being denied access to home health and NEMT transportation services throughout the state. 09-958 Pet. App. 147-151.

On July 9, 2009, the appeals court affirmed the August 18, 2008 preliminary injunction, 09-958 Pet. App. 2-29, 38.

The same July 9, 2009, decision also reversed the August 27, 2008, order which had denied retroactivity

---

[13] The November 17, 2008 order provided:

> The Court hereby orders the respondent Director, her agents, servants, employees, attorneys, successors, and all those working in concert with her to refrain from enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from reducing by ten percent payments under the Medi-Cal fee-for-service program for NEMT and home health services provided on or after November 17, 2008.

09-958 Pet. App. 153. (See findings, 09-958 Pet. App. 139-153).

of the injunction for the period of July 1, 2008 to August 18, 2008. 09-958 Pet. App. 29-38.[14]

On August 7, 2009, the appeals court affirmed the November 17, 2008, preliminary injunction. 09-958 Pet. App. 54-57.

The appeals court and the parties did not, in the latter two appeals in 09-958, revisit the issues which are the subject of the First Question Presented, because manifestly those same issues had been ruled upon by the appeals court in its September 17, 2008, opinion, which preceded the two appeals of the Director which are today the subject of 09-958.

---

[14] See n. 11 of this brief. I.e., the appeals court concluded that the State, in the state procedural statute under which the ILC plaintiffs sued in state court, waived the State's immunity to suits in respect to retroactive monetary obligations; and, that State immunity to suit for retroactive payments was also waived by the removal of the state suit, in 09-958, to federal court.

Again, violation of State sovereignty as to these retroactive payments, in respect to services furnished between July 1, 2008 and August 18, 2008, the date of the preliminary injunction in 09-958, is not a subject of contention in these certiorari proceedings.

PROCEDURAL STATEMENT IN RE 09-1158

The State legislature enacts AB 1183, a five percent payment reduction to pharmacies, to replace AB 5 eff. March 1, 2009: again, for solely budgetary reasons, again, in violation of Section 30A

The California Legislature then enacted Assembly Bill ("AB") 1183 to terminate AB 5 in respect to Medicaid services furnished after February 2009.[15]

AB 1183 also enacted a successor provider payment reduction for Medicaid services furnished on or after March 1, 2009 – again, purely for budgetary reasons.[16]

The arbitrary reduction in payment to pharmacies, this time, was five percent, under AB 1183. (09-1158 Pet. App. 206).

The same ILC plaintiffs then filed a new complaint under the Supremacy Clause, which alleged, again, that the new AB 1183 was contrary to hence preempted by Section 30A, for the same reason as AB 5: that it was enacted solely for budgetary reasons,

---

[15] This part of AB 1183 is set forth at 09-1158 Pet. App. 201-204.

[16] This part of AB 1183, which enacted the new payment-reducing State law, Cal. Welf. & Inst. Code § 14105.191, is set forth at 09-1158 Pet. App. 205-217.

contrary to Section 30A,[17] which would injure them and the beneficiaries who were their patients and clients, irreparably.[18] They again requested injunctive relief to prevent irreparable injury.

---

[17] Par. 24 alleged (Joint App. 150), that:

> (T)he State's sole purpose, and the conclusive factor, in enacting the 5% Rate Reduction was to reduce the budget deficit.

Par. 25 alleged that:

> Accordingly, . . . the action of the Legislature to enact the aforesaid provisions of § 14105.191 Welf. & Inst. Code, and the 5% Rate Reduction in respect to Pharmacy providers, were contrary to and in violation of the quality and access provisions of Section 30A, such that the Defendant Director will be acting in excess of and without jurisdiction to implement § 14105.191 Welf. & Inst. Code, including the 5% Rate Reduction for Pharmacy providers, commencing March 1, 2009.

[18] Par. 21 (Joint App. 148-149) alleged that:

> Further, unless restrained . . . the defendant Director will implement the aforesaid 5% Rate Reduction . . . which in turn will thereby result in injury to the Plaintiffs; to . . . [pharmacies] . . . and to their Medi-Cal patients – which injury will foreseeably result in Pharmacy providers . . . not accepting new Medi-Cal patients, or stopping serving Medi-Cal patients at all, or by reducing kinds, amounts, locations and levels of services to Medi-Cal beneficiaries, or by going out of business, so that thereby Medi-Cal beneficiaries . . . will be caused and threatened to be caused, denial and reduction of access to life-vital Pharmacy services and treatment in the Medi-Cal FFS program, resulting in great physical suffering and injury to beneficiaries who are patients of Plaintiffs . . . ; all to [their] irreparable injury[.]

The ILC plaintiffs' motion for preliminary injunction[19] was supported by declarations showing irreparable injury to beneficiaries and providers which was threatened by the new payment reduction law, AB 1183.[20]

On February 27, 2009, the district court:

- ruled that the new State law had been enacted for purely budgetary reasons, contrary to Section 30A;[21]
- found that irreparable harm to both beneficiaries and providers would result,[22] and,
- issued a negative injunction, ordering the Director to refrain from implementing AB 1183 in respect to pharmacies,

---

[19] Joint App. 39 (being Docket No. 10 in the district court).

[20] These declarations are set forth in Document 11 in the Docket of *Independent Living Center v. Maxwell-Jolly*, 2:09-cv-0382, C.D. Cal.

[21] 09-1158 Pet. App. 143.

The district court found:

> Here the legislative history shows no indication that the Legislature considered any of the relevant factors before implementing AB 1183. Instead, it appears that the Legislature enacted the rate reduction purely for budgetary reasons.

[22] 09-1158 Pet. App. 143-149.

> including refraining from reducing by five percent payments to pharmacies for prescription drugs.

09-1158 Pet. App. 151.

The new injunction tracked the language of the first injunction, so as to be a negative injunction.[23]

On March 3, 2010, the appeals court affirmed the February 27, 2009, preliminary injunction to enjoin implementation of the five percent deduction from pharmacy payments, of AB 1183 (09-1158 Pet. App. 53-58) in a short ruling that the Director failed to show any error in the district court's findings and conclusions. 09-1158 Pet. App. 53-58.

Thus, the appeals court affirmed the district court's rulings that the State Legislature enacted the AB 1183 reduction in provider payments, contrary to supreme federal law, Section 30A, for purely budgetary reasons; and that the reduction would injure providers directly by impacting the amounts paid to

---

[23] The February 27, 2009 order provided:

> The Court hereby orders the respondent Director, his agents, servants, employees, attorneys, successors, and all those working in concert with him to refrain from enforcing Cal. Welf. & Inst. Code § 14105.191(b)(3), as modified by AB 1183 beginning on March 1, 2009, by refraining from reducing by five percent payments to pharmacies for prescription drugs and traditional over-the-counter drugs provided by prescriptions) provided under the Medi-Cal fee-for-service program.

09-1158 Pet. App. 151.

them, and, would adversely impact access of beneficiaries to prescription drugs in the State's Medicaid program.

Again, the parties and the appeals court did not, in this appeal in re AB 1183, revisit the issues which are the subject of the First Question Presented, because manifestly those same issues had been ruled upon by the appeals court in its September 17, 2008, opinion, and bound the result.

* * *

NOTE: The 09-983 case has not been rendered moot by the termination by the State Legislature of AB 5 effective at the close of February 2011.

Neither has the 09-1158 case been rendered moot by either of two State laws, AB 97, sections 93.2 and 93.5, which are mentioned by the Intervenors in 09-958 as having been recently enacted by the State Legislature, in March and June of 2011.

This is because voluntary termination of the preempted implementation by the State of AB 5 or AB 1183 by the passage of the new State laws mentioned by the Intervenors, would still leave unresolved the question, in the final analysis, of whether the Director is entitled to recoupment of the amounts ordered by the district court to be paid to providers.

NOTE ALSO: In November 2010 the federal Centers for Medicare and Medicaid Services ("CMS")

did deny the State Plan Amendments ("SPAs") submitted by the California Dept. of Health Care Services ("DHCS") to CMS for approval of the AB 5 and AB 1183 Medicaid provider payment reductions.

These rulings are not any final ruling against the State, because DHCS filed an administrative appeal.

A briefing schedule has been set which takes the appeal through November 2011, before any final decision will be made by the Secretary on this DHCS appeal.

Hence, nothing has happened so far in the administrative proceedings between the Secretary and DHCS, which is any cause for the ILC cases in 09-958 and 09-1158 to be stayed, or for the Court to surrender jurisdiction over the causes in the ILC cases, to the Secretary, in any way.

PART TWO

A. THE GENERAL HISTORY OF LITIGATION UNDER THE MEDICAID ACT

The "pre-1983" period

Before it became recognized in 1980 that the "laws" in 42 U.S.C. § 1983 included the Medicaid Act, suits by beneficiaries and providers under the Supremacy Clause to obtain injunctive or declaratory relief, to prevent being injured from a State's violation of the Medicaid Act were commonplace.

See, the following Supremacy Clause cases, before § 1983 came into use in 1980:

Eligibility rules change:

- *Bass v. Rockefeller,* 331 F.Supp. 945 (S.D.N.Y. 1971).
- *Webb v. Aggrey,* 447 F.Supp. 17 (W.D. Ohio 1977).

Payments to nursing homes:

- *Harmony Nursing Home, Inc. v Anderson,* 341 F.Supp. 957, 958 (D. Minn. 1972).

Inclusion of eye-glasses:

- *White v. Beal*, 555 F.2d 1146 (3d Cir. 1977).

Transportation services:

- *Smith v. Vowell,* 379 F.Supp. 139 (D. Tex. 1974).

Payments to health care facilities:

- *Minn. Assn. of Health Care Facilities v. Minn. Dept. of Public Welfare,* 602 F.2d 150, 154 (8th Cir. 1979).

Supplemental benefit:

- *Hayes v. Stanton,* 512 F.2d 133 (7th Cir. 1975).

The "§ 1983 period"

Medicaid beneficiaries and providers sued under § 1983 once it became available in 1980, by the *Thibotout* decision.[24]

This fashionable use of § 1983 was not because Congress commanded its use or prohibited any Supremacy Clause suit to be filed, but because 42 U.S.C. § 1988, permitted attorneys' fees to be awarded in a § 1983 case, but not if the pleader sued only under the Supremacy Clause.

"Post-1983" Medicaid actions

More recently –when a number of Circuits "abolished" § 1983 suits in respect to Section 30A – the Medicaid litigation bar simply returned to their horse-and-buggy vehicle – the Supremacy Clause cause of action – which they had prior used, long before the sleek Cadillac § 1983 jurisdictional vehicle came into, and went out of, use.

B. THE HISTORY OF SECTION 30A LITIGATION

The litigation in respect to Section 30A, both in California and elsewhere, is set forth below.

---

[24] *Maine v. Thibotout*, 448 U.S. 1 (1980).

Section 30A:

- *Illinois Hospital Assn. v. Illinois Dept. of Pub. Aid,* 576 F.Supp. 360, 368-369 (N.D. Ill. 1983) (provider payment reduction, based solely on budgetary considerations, enjoined);
- *California Hospital Assn. v. Schweiker,* 559 F.Supp. 110, 114 (C.D. Cal. 1982) (provider payment limit, based solely on budgetary considerations, enjoined);
- *Arkansas Medical Society, Inc. v. Reynolds,* 6 F.3d 519, 531 (8th Cir. 1993) (provider payment reduction, based solely on budgetary considerations, enjoined);
- *Wisconsin Hospital Assn. v. Reivitz,* 733 F.2d 1226, 1236 (7th Cir. 1984) (provider payment limit, based solely on budgetary considerations, enjoined);
- *Clayworth v. Bonta,* 295 F.Supp.2d 1110, 1119 (E.D. Cal. 2003) (five percent provider payment reduction, based solely on budgetary considerations, enjoined) *rev'd,* for not qualifying as a § 1983 suit (9th Cir. 2004);
- *ILC v. Shewry,* 543 F.3d 1050 (9th Cir. 2008), AB 5 case (ten percent provider payment reduction, based solely on budgetary considerations, enjoined);
- *ILC v. Maxwell-Jolly,* 09-1158 App. 53 (9th Cir. 2010), AB 1183 case (five percent

provider payment limit, based solely on budgetary considerations, enjoined);

– *Cal. Pharm. v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009), AB 1183 case (provider payment limit, based solely on budgetary considerations, enjoined).

In each of these cases the facts are always the same: the State legislature enacted a State law, solely for budgetary reasons, to reduce payments to the Medicaid providers in the State – which is promptly enjoined by a federal court, for violating the quality and equal access provisions of supreme federal law, Section 30A.

There is no question, under this unbroken line of decisions, that the quality and equal access clauses of Section 30A are violated whenever a State legislature reduces a Medicaid provider payment rate **for solely budgetary reasons**.

In any event, such suits by beneficiaries and providers (on their own account and as representatives of their Medicaid patients), to obtain compliance of a State with the minimum provider payment requirements of federal law are routinely filed today under the Supremacy Clause, just as other Supremacy Clause cases were routinely filed by the Medicaid litigation bar, long before §1983 was "discovered."

Congress, with knowledge that Supremacy Clause actions are litigated, has never acted to stop them. This signifies Congressional approval, not disapproval, of Supremacy Clause actions of the sort filed by the ILC plaintiffs in the ILC cases at bar

Congress was well aware throughout all the 13-year period before *Thibotout* was decided in 1980, that beneficiaries and providers were using the Supremacy Clause to prevent being injured from the usual State violations of the Medicaid Act.

Congress is well aware today, that these Supremacy Clause suits are being filed all over the country.

Congress' silence in face of this knowledge speaks approval, not disapproval, of such suits as the ILC suits at bar.

As reported by the Court in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 516-517 (1990):

> During the 1970's provider suits in the federal courts were commonplace. In addition, in response to several States freezing their Medicaid payments to health care providers, Congress amended the Act in 1975 to require the States to waive any Eleventh Amendment immunity from suit for violations of the Act. (*See,* H.R. Rep. No. 94-1122, p. 4 (1976); *see* also 121 Cong. Rec. 42259 (1975) (remarks of Sen. Taft). Congress believed the waiver necessary because the existing means of enforcement –

> noncompliance procedures instituted by the Secretary or suits for injunctive relief by health care providers – were insufficient to deal with the problem of outright noncompliance because they included no compensation for past underpayments. *See* H.R. Rep. No. 94-1112, *supra,* at 4. The amendment required the Secretary to withhold 10% of federal Medicaid funds from any State that had not executed a waiver of its immunity by March 31, 1976. Pub. L. 94-182, § 111, 89 Stat. 10545. The provision generated a great deal of opposition from the States and was repealed in the next session of Congress. Pub. L. 94-552, 90 Stat. 2540, *see* H.R. Rep. No. 94-1122, *supra,* at 4. But Congress explained that it did not intend the repeal to "be construed in any way contravening or constraining the rights of providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive relief in a federal or a state judicial forum. Neither should the repeal of [the waiver section] be interpreted as placing constraints on the rights of parties involved to seek such prospective, injunctive relief."

As noted further by Alito, J., *Pennsylvania Pharmacists Assn. v. Houston,* 283 F.3d 531, 541 (3d Cir. 2002):

> (T)he House Committee Report on the 1981 amendments of (Section 30A) observed that

> "in instances where the States or the Secretary fail to observe these statutory requirements, **the courts would be expected to take appropriate remedial action.**" H.R. Report 97-158, vol. II, at 301 (1981).

(Boldface emphasis supplied).

Thus, Congress has never enacted any provision to prevent beneficiary or provider litigation in respect to the minimum requirements which States must comply with in setting Medicaid provider payment rates under Section 30A.

Hence, from the above, Congress has implicitly and expressly approved the Supremacy Clause cause of action in respect to State violations of Section 30A of the Medicaid Act, by never attempting to block its use by any Congressional enactments on the subject, and by comment in committee that Congress expected such litigation to be conducted, whenever a State failed to meet the minimum requirements, as in case at bar, of Section 30A.

The litigation history of Section 30A shows that it is Medicaid beneficiaries and providers, alone – not the Secretary at all – who customarily vindicate the supremacy of the Medicaid Act

The foregoing litigation history of Section 30A, set forth above, shows that for the life of the Act – and in the ILC cases – it has always been beneficiaries and providers – **never** the Secretary – who have

vindicated the federal interest in the supremacy of the Medicaid Act, against federally preempted State reductions of payments to Medicaid providers, contrary to Section 30A, which injure or threaten to injure access of beneficiaries to Medicaid services.

And again, it **has never been the Secretary**, in any of the reported cases – or in the ILC cases – who defended the ill, the aged, and the disabled beneficiaries in these cases: but, always, it has been, and still is in the ILC cases at bar, the beneficiaries and providers who bring to the attention of the federal court the fact of violations by States of the minimum payment requirements of federal law (Section 30A), and obtain the remedy of injunction against States' violations of this supreme federal law.

PART THREE

THE PRIMARY ISSUES OF THESE CASES

THE TWO CENTRAL ISSUES OF THESE CASES WERE RAISED, OR JOINED, IN THE FIRST MOTION OF THE ILC PLAINTIFFS FOR A PRELIMINARY INJUNCTION, TO ENJOIN THE DIRECTOR FROM IMPLEMENTING THE PREEMPTED STATE LAW, AB 5, IN 09-958

The precise base claims of the ILC plaintiffs under the Supremacy Clause, for a negative injunction to enjoin the Director from withholding ten percent from all payments to providers, commencing July 1,

2008, under State law, AB 5 (in 09-0958) are set forth in their amended petition for a writ of mandamus filed in the state court in the spring of 2008 (Joint App. 85-124). The action was removed by the Director to the district court. Joint App. 1, Document 1. See, first amended petition for mandamus. Joint App. 140-155.

These base claims are encapsulated in the ILC plaintiffs' memorandum in support of their initial motion for preliminary injunction,[25] of which a relevant part is set forth *en haec verba* below:

> The procedural violation was that the rates were reduced arbitrarily and capriciously, for budgetary reasons, without the Legislature considering whether the "reduction could be sustained by providers, in light of their costs, without a loss in quality or equal access for Medi-Cal recipients;" as required by the quality and access clauses of Sec. 30(A). (See, *Clayworth* [*v. Bonta*], *supra*, 295 F.Supp.2d at 1128.)
>
> Therein, under the Supremacy Clause as interpreted by the *Ex parte Young* line of decisions, not only is (1) the ten percent provider payment reduction statute (§§14105.19, subds. (a), (b)(1), (b)(2), and (c), and §14166.245, subd. (a), of the Welf. & Inst. Code), preempted by the contrary requirements of the

---

[25] Joint App. 2. This Memorandum is Document 11 in the District Court Clerk's docket in 2:08-cv-03315, C.D. Cal.

quality and equal access clauses of Sec. 30(A), but, also (2) the above [seven] plaintiffs have an implied right to injunctive relief against the Director, who is threatening to injure them, and subjecting them to risk of injury, by implementing the preempted 10% payment cut to Medi-Cal managed care plans in violation of federal law, namely, Sec. 30(A) . . .

NOTE: In so suing, the [seven] plaintiffs in the First Cause of Action are not exercising any private right of action right under 42 U.S.C. § 1983, as a sword, to enforce Sec. 30(A), but, to the contrary, are instead invoking the protection of the Supremacy Clause, as a shield, as permitted them by the doctrine of *Ex parte Young*. As held in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987):

"[A] claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law."

and, as held by *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997):

"Although there is some confusion in the cases, we agree with those commentators who have concluded that 'the best explanation of Ex parte Young and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state

officers who are threatening to violate the federal constitution or laws.'"

13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction 2d, § 3566, at 102 (1984); see also *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (quoting same). . . .

RELIEF REQUESTED IN THE FIRST CAUSE OF ACTION

The aforesaid [seven] plaintiffs, in the First Cause of Action, request a preliminary injunction to restrain the Director from implementing subds. (a), (b)(1), (b)(2), and (c)-(e) of § 14105.19 Welf. & Inst. Code, and §14166.245, subd. (a), Welf. & Inst. Code; including, without limitation, refraining from implementing the 10% rate cut, or any rate cut, in respect to Medi-Cal fee-for-service providers for dates of service on and after July 1, 2008, or at any time, pending final determination of this action.[26]

---

[26] The preempted State statute in the ILC Plaintiffs' second case (No. 09-1158) was AB 1183.

AB 1183 was the successor to AB 5 when AB 5 sunset at the end of February 2009.

AB 1183 required the Director to deduct five percent from the Base Fee Schedule amount for Medi-Cal fee-for-service pharmacy providers (among other Medi-Cal services which were affected by AB 1183).

(End of quoted portion of ILC Plaintiffs' memorandum in support of preliminary injunction in the district court in 09-958.)

The Director's precise objection to this first ILC motion was his claim that no injunction could be issued under the Supremacy Clause, because the preempting federal law, Section 30A, created no "federal right" in the ILC plaintiffs to "enforce" Section 30A – which was claimed by the Director to be required by 42 U.S.C. § 1983 and the *Gonzaga* line of cases.[27]

The second objection of the Director to the first ILC motion for preliminary injunction case was his claim that there can be no cause of action because the ILC plaintiffs are unable to plead or show they have any "right" which was violated or threatened to be violated by the State's violation of the preempting federal law, Section 30A.[28]

* * *

---

[27] *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992).

This objection is set forth in the Director's *Opposition* to the ILC plaintiffs' initial preliminary injunction motion, in June 2008. [Document 74 in Excerpts of Record in Appeals Case 08-56422, which is Document 35 in the docket of C.D. Cal, No. 2:08-cv-03315, in 09-958].

[28] The objection was that the ILC plaintiffs had no primary "right" to the performance of a corresponding "duty." Page 11 of the Director's *Opposition*. [This is Document 74 in Excerpts of Record in Appeals Case 08-56422, which is Document 35 in the docket of C.D. Cal. No. 2:08-cv-03315, in 09-958.]

The district court denied preliminary injunction; but was reversed by an appeals court order filed July 11, 2008, followed by an explanatory opinion filed September 17, 2008 (543 F.3d 1050).

The appeals court overruled the two objections of the Director, and remanded the case to the district court. The decision of the appeals court was precisely as set forth *en haec verba* below:

> The only issue before this court is . . . whether ILC may maintain a valid cause of action to enjoin implementation of AB 5 on the basis of federal preemption. (09-958 Pet. App. 67-68).
>
> . . .
>
> Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.
>
> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. They do not seek to enforce any substantive "right" conferred by the statute. Instead, they argue that the cuts mandated by AB 5 are themselves unenforceable, because they exceed the scope of the State's discretion under the

> Act and violate federal standards. As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.

(End of quotation, at 09-958 Pet. App. 92-93).[29]

This basic decision of the Ninth Circuit, 543 F.3d at 1056-57, Pet. App. 68-69 cited:

- *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 281 ("An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient" to seek injunctive relief under *Ex parte Young,* 209 U.S. 123 (1908);
- *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. 256, 259 n.6 (1985) (failure to distribute federal funds as required by the federal law under which the funds were granted), describing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) as reaffirming the general rule that a plaintiff asserting preemption under 28 U.S.C. § 1331 has stated a federal claim for relief;
- *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973): airport operator had no statutory right created by the preempting federal statute, but suffered economic or other adverse effect

---

[29] 543 F.3d at 1065-66.

from city ordinance that limited flight landing hours, which conflicted with a federal law;

- *Ray v. Atlantic Richfield Co.*, 436 U.S. 151 (1978): tanker owner had no statutory right created by the preempting federal statute, but suffered economic or other adverse effect from a State law regulating minimum ship operations in State waters, which conflicted with a federal law;

- *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992): hazardous waste operators had no statutory right created by the preempting federal statute, but, suffered economic or other adverse effect from a State hazardous waste operator licensing law, which conflicted with a federal law;

- *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190 (1983): nuclear plant operator had no statutory right created by the preempting federal statute, but, suffered economic or other adverse effect from a State public safety and environment law, which conflicted with a federal law;

- *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963): avocado growers had no right created by the preempting federal statute, but, suffered economic or other adverse effect from a

State avocado marketing law, which conflicted with a federal law.

NOTE: This September 17, 2008 opinion became the law of the case, so as to be the decision upon which all the subsequent rulings in the ILC cases were based (whether or not the subsequent appeals court decisions under review in the ILC cases in 09-958 and 09-1158, mention this seminal September 17, 2008 opinion.

PART FOUR

THE DIRECTOR HAS IMPLICITLY CONCEDED THAT HIS FIRST MAJOR OBJECTION TO JURISDICTION AND CAUSE OF ACTION, HAS NO MERIT

The Director, by admitting in his merits brief (Dir. Brief 43) that a person may use the Supremacy Clause either as (1) a defense to a State suit against the person or (2) as the basis for a pre-emptive suit (mis-named as a "pre-enforcement suit" by the Director), to prevent being injured from prospective State implementation of a federally preempted State law, has conceded that both of his major premises, that:

- the ILC plaintiffs must have a *Gonzaga* "federal right" in order to file a Supremacy Clause pre-enforcement suit in the case at bar, and in any event,
- the ILC plaintiffs must have some "right" which was threatened to be

violated by the State's violation of the preempting federal law, Section 30A,

are erroneous, so as to be no basis for the Court to overrule the affirmation by the appeals court of the preliminary injunctions of the district court in the ILC cases.

PART FIVE

ARGUMENT

THESE CASES ARE ABOUT INJURY

The ILC cases are about prevention of injury (i.e., adverse effect upon each of the ILC plaintiffs); and vindication of the federal interest in the supremacy of federal law; not, about "enforcement" of "rights"

Civil law is divided into two parts: the law of rights, and the law of injury.[30]

---

[30] *See:*

– *Marbury v. Madison,* 5 U.S. 137, 163 (1803):

> [I]t is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.

– *Western Pacific, Cal. R. v. Southern Pacific Co.*, 284 U.S. 47, 51-52:

> A person is a "party in interest":
>
> . . . if the bill discloses that some definite legal right possessed by the complainant is seriously threatened or that the unauthorized and therefore unlawful

(Continued on following page)

If one sues to enforce a right, then he must show he has the "right" he claims. Otherwise he is out of court. The ILC cases are not that case.

There is of course a large body of law dealing with the subject of "enforcement of rights," such as in the *Gonzaga/Freestone/Blessing* line of decisions.

Nevertheless there is a completely separate body of law which establishes that a person threatened with injury may, in the equity jurisdiction of the federal courts, obtain injunction to prevent being injured from on-going acts of a federal or a State officer which are contrary to, hence preempted (i.e., made void) by a federal law.

Below are just a few of the many decisions in which the cause of action has been that the plaintiff is threatened to be injured from federally preempted acts of a public officer.

First, the ILC plaintiffs list some of the many cases in which federal officers have been enjoined, or in which it was stated that injunction was available, to prevent injury from federal officers' acts contrary to supervening federal law:

– *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902):

---

action of the defendant . . . may directly and adversely affect the complainant's welfare[.]

> The acts of all its officers must be justified by some law and in case an officer violates the law to the injury of an individual the courts generally have jurisdiction to grant relief (187 U.S. at 108).

– *Abbott Laboratories v. Gardner,* 387 U.S. 136, 142-43 (1967):

> There is jurisdiction in equity for a suit to restrain the F.D.A., to prevent injury to a plaintiff, from implementing a regulation adopted contrary to the Federal Food, Drug, and Cosmetic Act of 1938. (387 U.S. at 142-43).

– The Department of Justice advised Congress in 1938:

> (A)ny citizen aggrieved by any order of the Secretary, who contends the order is invalid, may test the legality of the order by bringing an injunction suit against the Secretary, or the head of the Bureau, under the general equity powers of the court. 83 Cong. Rec. 7892 (1938). (*Abbott Laboratories,* 387 U.S. at 142-3).

– *Columbia Broadcasting System v. United States,* 316 U.S. 407, 422-423 (1942):

> Network broadcasting company may sue for injunction to prevent adverse effects on its economic welfare, from action of the FCC which are contrary to federal law.

– *Western Pacific*, 284 U.S. at 51-52:

> Railroad may sue for injunction, where unlawful action of a competitor adversely affected its economic welfare.

NOTE: *Abbott Laboratories* also held, 387 U.S. at 140, that judicial review of a final agency action **by an aggrieved person** will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

Abbott Laboratories also reported the fact that during Congress' consideration of various bills to provide, in the Food, Drug, and Cosmetic Act, that consumers may sue, that it was recognized that "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy at law. . . . H.R. Report No. 2755, 74th Cong. 2d Sess. 8. (387 U.S. at 142)."

Second, the ILC plaintiffs list some of the many cases in which injunctions were issued, or in which it was stated that injunction was available, to prevent injury from State officers contrary to, hence preempted under the Supremacy Clause by, a federal statute:

– *Golden State Transit Co. v. Los Angeles*, 475 U.S. 608, 619-620 (1986): Held: The pleadings established a Supremacy Clause cause of action for preemptive injunction to prevent injury to a taxi company, from a city's violation of the NLRA.

- *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 281 (1997) (An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to seek injunctive relief);
- *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985);
- *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983);
- *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973);
- *Ray v. Atlantic Richfield Co.*, 436 U.S. 151 (1978);
- *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992);
- *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190 (1983);
- *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963);
- The seven Supremacy Clause suits in respect to State violations of the Medicaid Act, listed prior in this brief.

Summary of this sub-point:

It is abundantly clear that to obtain an injunction to prevent injury – defined as an adverse effect upon the economic or other welfare of the Medicaid

beneficiaries and providers who are plaintiffs in the ILC cases, and, who are the patients, clients, and members of various of the ILC plaintiffs – the plaintiffs do not need to show any "right" created by the preempting federal statute, but, rather, need only plead or show that the State Legislature violated the preempting federal statute (Section 30A), and that implementing the preempted ten percent provider payment reduction of AB 5, and implementing the five percent provider payment reduction of AB 1183, would injure or threaten to injure the above-listed beneficiaries and providers.

***Bond v. United States*, 540 U.S. ___ (2011), resolves many issues in favor of the ILC plaintiffs in 09-958 and 09-1158.**

This is because it is implicit or a fair inference from *Bond* that:

First. The theory of the Director and the Government[31] that a plaintiff must plead a "right" in order to maintain Article III standing and a cause of action under the Supremacy Clause, is facially without merit.

Instead, as claimed by the ILC plaintiffs:

- An injury which is an adverse effect from a State or federal agency's action, as in the ILC cases, is sufficient for Article III standing and cause of action

[31] Govt. Brief 13-16.

purposes if the injury meets Article III prudential requirements (*Bond, slip opinion* 3-8);

– An individual has a direct interest in objecting to State laws that upset the constitutional balance between the Union and the States when the enforcement of these State laws, as in the ILC cases, is contrary to supreme federal law, and causes injury to the individual that is concrete, particular, and redressable. (I.e., here, the ILC cases are a mirror situation of the *Bond* situation. See, *Bond, slip opinion* 10-11).

Second. The theory of the Director and the Government that because generally a plaintiff "cannot rest his claim on the legal rights or interests of others,"[32] that *ergo,* only the Government may assert a claim for the within State violations of Section 30A, is irrelevant in the ILC cases at bar: due to the fact that in the ILC cases the ILC plaintiffs are asserting their own injury from State government action taken in excess of the limits on a State that federalism defines. (See *Bond, slip opinion* 8).

I.e., here the ILC plaintiffs assert their own injuries (and the injuries of beneficiaries who are their

---

[32] *Warth v. Seldin*, 422 U.S. 490, 499, 500 (1976); see also *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

patients, clients, or members), from State governmental action taken in excess of a limitation on State authority that federalism defines).

Third.

- (1) In *Bond* it was the United States who usurped a constitutional limit, whereas in the ILC cases it was a State who usurped a constitutional limit; and,

- (2) The federalism defense was raised by Bond as a defense in proceedings commenced against Bond; whereas, in the ILC cases, the ILC plaintiffs allege their Supremacy Clause defense in a preemptive suit in equity to prevent irreparable harm to themselves as Medicaid beneficiaries and providers, and to prevent harm to Medicaid beneficiaries who are the patients, clients, and members of various of the ILC plaintiffs.

Such preemptive suits to prevent irreparable injury are well established, under the equity jurisdiction afforded to the federal courts by Congress, and by 28 U.S.C. § 1331. *See, Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281 (1997) (an allegation of an ongoing violation of federal law with request for prospective injunctive relief is ordinarily sufficient under *Ex parte Young,* 209 U.S. 123); John Harrison, *Ex parte Young,* 60 Stan. L. Rev. 989, 997-999 (2008).

Conclusion

For the above reasons, the ILC plaintiffs have Article III standing and a cause of action to obtain injunctive or declaratory relief to prevent being injured from the Director's preempted acts to implement the State laws, AB 5 and AB 1183, contrary to, hence preempted under the Supremacy Clause, by Section 30A.

The case made by the ILC plaintiffs below, is that the ILC plaintiffs did *not* sue to "enforce" any "federal right" or any "right" enacted by the preempting federal law, Section 30A; but sued to obtain injunctive relief to prevent being injured from the Director implementing two State laws (AB 5 and AB 1183) which were enacted contrary to, hence were preempted under the Supremacy Clause by, a federal law (Section 30A)

Thus, in the view of the ILC plaintiffs – and as expressly held by the Ninth Circuit in its September 17, 2008, opinion which became the law of the case in these ILC cases – the error of the Director and his amici is their insistence that for lack of any "right" enacted in their favor by Congress, that the battle is lost by the ILC plaintiffs.

However, as correctly pointed out by the appeals court in the September 17, 2008, opinion, the ILC plaintiffs did not sue in the ILC cases under the

"rights" branch of jurisprudence, but, rather, sued instead under the "injury" branch of jurisprudence.

Thus, the appeals court held in its September 17, 2008, decision, exactly this (09-958 Pet. App. 67-68):

> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. **They do not seek to enforce any substantive "right" conferred by the statute.** Instead, they argue that the cuts mandated by AB 5 **are themselves unenforceable**, because they exceed the scope of the State's discretion under the Act and violate federal standards. **As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.**

(Boldface emphasis supplied).

Hence the continued objection of the Director that the ILC plaintiffs have no "right," is simply irrelevant to the "injury" case made by the ILC plaintiffs.

Finally on this score, the ILC plaintiffs simply contend that, by filing their suit **under the "injury" branch of jurisprudence**, and alleging they were threatened with injury from on-going acts of a State officer contrary to the supreme law of the land (Section 30A), that they have satisfied the requirements

for standing and a Supremacy Clause cause of action, in the ILC cases.

These cases established that to state a cause of action for injunctive or declaratory relief to prevent injury by acts of a public officer, which are contrary to a federal law, there need not be any "injury" to a "right," but, only that some interest of the plaintiff be "adversely affected."

PART FIVE

THERE ARE AT LEAST THREE SUPREMACY CLAUSE CAUSES OF ACTION, ARISING FROM THE PLEADINGS AND MOTIONS OF THE ILC PLAINTIFFS

WHAT IS NOT AT ISSUE

There is no issue before the Court that the State laws in the ILC cases conflict with, hence are preempted by the Medicaid payment-setting statute, Social Security Act § 1902(a)(30)(A) – "Section 30A" – and that beneficiaries and providers would be injured by implementation of the preempted State laws in question.

This issue was resolved when the Court denied certiorari on exactly that question, in these ILC cases, and, granted certiorari only as to the First Question Presented.

THE CAUSES OF ACTION WHICH AROSE OUT OF THE FACTS IN EACH OF THE THREE ILC PLAINTIFFS' PRELIMINARY INJUNCTIONS

Several types of Supremacy Clause causes of action arose out of the ILC pleadings in the two complaints and three motions for preliminary injunctions in the ILC cases in Nos. 09-958 and 09-1158. These are described below.

FIRST CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158

1. The facts pleaded and shown for each of three preliminary injunctions in the ILC cases, established a "pre-emptive" cause of action, respectively, under the Supremacy Clause for an injunction to prevent prospective injury

Such a pre-emptive type cause of action in equity is well recognized. See, Harrison, *Ex parte Young*, 60 Stanford L. Rev. 989 (2008); Kennedy, J., dissenting, in *Golden State,* 493 U.S. at 113, 115-118, and in *Dennis v. Higgins*, 498 U.S. 439, 457-458 (1991): a person has an immunity, which is a legal interest, from State action which violates a limit of the Constitution on State powers (*Golden State,* 493 U.S. at 113-114); which immunity provides the person the implicit right to obtain adjudication in litigation with

the State, that the State's action is a nullity (*Dennis*, 498 U.S. at 457).

Also, see, decisions which established the pre-emptive Supremacy Clause cause action (albeit in a Contracts Clause context) such as *Carter v. Greenhow*, 114 U.S. 317 (1895); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876); *Allen v. Baltimore & Ohio R. Co.*, 114 U.S. 311 (1885); and of course, *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

The ILC plaintiffs submit that these authorities and case law established that:

(1) In a pre-emptive suit in equity to obtain protection against injury from preempted State action, the Supremacy Clause is self-executing, so as to automatically void any State law which is contrary to a federal law. This *inter alia* strips state officers of all authority and power to implement the preempted state law. *Ex parte Young*, 209 U.S. at 159-160.

(2) The officer's lack of authority and power gives rise to a correlative legal defense – which is a legal interest or an immunity – which can be used by the citizen – just as the ILC plaintiffs did use it in each of their three preliminary injunction motions in their cases at bar – as the basis of a cause of action in equity to obtain injunctive relief to restrain the officer from further preempted acts to implement the void, preempted state law.

NOTE: The ILC plaintiffs reason, and contend, that these characteristics dictate who may be the plaintiff in such a suit.

I.e., it is manifest that once the officer is stripped of all authority and power by the *in rem* preemptive effect of supreme federal law, to act, that the officer thereafter acts *sans law,* so as to be acting tortiously in the premises.

As such, all those who can or should be allowed to sue to restrain the officer from acting *sans law* in the premises, are those in the range of fire from the officer's lawless acts. Hence under this view, all persons adversely affected (i.e., injured) by the lawless acts of the officer, have a manifest right in equity for an injunction to restrain the officer from performing the acts which are injuring or threatening to injure the plaintiff.

It therefore is the case that in the ILC cases, both Medicaid beneficiaries and providers have a cause of action for injunction to prevent the Director from lawlessly acting, to injure them, because both are in the direct line of fire to be injured, were the Director to be permitted by the court to continue his lawless acts, contrary to federal law.

I.e., as noted by the appeals court, providers are injured simply because moneys otherwise payable to them, are withheld, under AB 5 and AB 1183.

And beneficiaries, *inter alia*, are injured or threatened to be injured, by the loss of access to

life-saving health care services, caused by providers not serving them, due to the reduced level of compensation for their professional services.

Conclusion:

For the above reasons, beneficiaries and providers have a cause of action for injunction to prevent injury from preempted prospective acts of the Director, contrary to supreme federal law, Section 30A: **irrespective of whether or not** they were intended beneficiaries of the preempting federal law, and **irrespective also** of whether or not, within a zone of reasonableness, Section 30A was enacted to protect them.

This result is compelled because the injury in a Supremacy Clause case is not the injury to some right which sounds in contract or the law of statute, but, rather, is an injury prospectively to be inflicted by the defendant, which sounds in tort law because in the premises, the officer is acting tortiously, *sans* any law to justify his lawless acts.

In any event, beneficiaries were clearly intended by Congress to be benefitted by the Medicaid Act and by Section 30A; and as such, had a cause of action for an order protecting them from injury caused by the Director's preempted acts.

Pennsylvania Pharm. Assn. v. Houstoun, 283 F.3d 531, 543-544 (3d Cir. 2002), Alito, J., held that

Medicaid beneficiaries "plainly satisfy the intended-to-benefit requirement," in respect to Section 30A.

The same reasons why beneficiaries are intended beneficiaries of Section 30A, also persuade that beneficiaries are well within the zone of interests to be protected by Section 30A (*Assn. of Data Proc. Service Org. v. Camp,* 397 U.S. 150, 153 (1970)).

Accordingly, it is manifest that under the principles of a Supremacy Clause pre-emptive suit, set forth above, beneficiaries clearly have Article III standing and a pre-emptive cause of action, in the ILC cases in 09-958 and 09-1158.

Injured providers and beneficiary organizations and member groups also have standing and a pre-emptive cause of action, in a representative capacity, for their patients, clients and members who are beneficiaries.

It follows that because beneficiaries have a pre-emptive cause of action in the ILC cases, so also do providers (here, the three pharmacy plaintiffs), and the Independent Living Center and the Gray Panthers groups, who are plaintiffs, have the same cause of action, to sue in a representative capacity, to advance the interests of the Medicaid beneficiaries who are their patients, clients, or members.

The decision of Hon. David Levi, former chief judge of the Eastern District of California, now the Dean of Duke Law School, in *Clayworth v. Bonta,* 295

F.Supp.2d 1110, 1117-20 (E.D. Cal. 2002), *reversed other grds.*, is definitive on this subject.

Summary

For the reasons given, each of the ILC plaintiffs had Article III standing, and a cause of action for a Supremacy Clause pre-emption suit, in equity, for injunction to prevent injury from on-going acts of the Director contrary to, hence preempted by, Section 30A.

SECOND CAUSE OF ACTION ARISING OUT OF THE FACTS IN THE ILC CASES IN 09-958 AND 09-1158

The facts pleaded and shown also established a cause of action in the ILC plaintiffs for injunctive relief, to enjoin on-going acts of the Director contrary to, hence preempted under the Supremacy Clause by, a federal law (Section 30A): – which cause of action is based on the principle that a plaintiff (1) showing Article III injury and (2) asserting preemption under the Supremacy Clause has stated a claim for relief.

Discussion

This specific Supremacy Clause cause of action in 09-958 was before the Court of Appeals and was **judicially approved** by the Court of Appeals in its

first decision in the ILC cases, filed September 17, 2008 (09-958 Pet. App. 58-93).[33]

The ILC plaintiffs here quote this September 17, 2008 appeals court decision verbatim, in its relevant part:

> Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.
>
> In this case, ILC alleges that the cuts violate the substantive provisions of the Medicaid Act, and are therefore unlawful. They do not seek to enforce any substantive "right" conferred by the statute. Instead, they argue that the cuts mandated by AB 5 are themselves unenforceable, because they exceed the scope of the State's discretion under the Act and violate federal standards. As AB 5 is causing injury to one or more of the ILC plaintiffs, and the other requirements of Article III standing were met, no more is required to allow this suit to go forward.

(Quotation from 09-958 Pet. App. 67-68, 92-93).[34]

which decision cited the same cases which were prior cited by the ILC plaintiffs in Part Three of this brief:

---

[33] 543 F.3d 1050.

[34] 543 F.3d at 1055-1056.

– *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1,* 469 U.S. at 359 n.6; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624; *Ray v. Atlantic Richfield Co.*, 436 U.S. 151; *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86; *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190; *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); and *Green v. Monsour,* 474 U.S. 64, 68,

and in Part Five of this brief.

The ILC plaintiffs submit that these cases, and the appeals court decisions in 09-958 and 09-1158 were based on principles developed in case law in mid-last century, epitomized in cases such as *Abbott Laboratories v. Gardner, supra.*

These cases held, and their principle was, that persons aggrieved by administrative action, State or federal, had standing and a cause of action for injunctive relief to prevent harm from agency action in excess of and without authority of federal law.

The ILC plaintiffs suggest, also, that this standard Supremacy Clause cause of action is simply a manifestation and implementation – although not articulated as such – of the principle that the King must obey the law of the land, hence, may not injure a subject by acts which are contrary to the law of the land; (a rule in respect to which Magna Carta, clause 39 in the 1215 charter, the ILC plaintiffs submit, is but an example, and not a full statement of the rule).

Standing to sue

The ILC plaintiffs submit that they believe that their standing to sue should be based on the same criteria as the criteria for standing in the pre-emptive Supremacy Clause cause of action described prior in this brief, as in the First Cause of Action just prior discussed.

THIRD CAUSE OF ACTION THE FEDERALISM CAUSE OF ACTION ARISING OUT OF THE FACTS OF THE ILC CASES IN 09-958 AND 09-1158

A

The ILC plaintiffs as citizens have a right and recognizable interest – in their capacity as the intended and protected beneficiaries of federalism – to sue to protect themselves against injury from a State's violations of limits placed upon it by the power-allocating provisions of the Constitution – here, the Supremacy Clause.

This cause of action is implicit in the federalism system created by the division, allocation, and limits of and upon federal and state powers by the Constitution; hence shall be referred to in the ILC Brief as the "federalism cause of action."

Federalism is, simply, the allocation in the Constitution of powers to the national government, the reservation of all other powers to the states, and the provisions, which include the Supremacy Clause,

which allocate federal/state powers by limiting state powers, which created the boundaries between, and the spheres of power of, the national government and the states.

Central to federalism are the principles, which the Court has recognized since the beginning, both that a state, and a state law, must yield to a contrary federal law, whenever a state law conflicts with a federal law.

Also, the doctrine of federalism is based on the premise that the Constitution is not a compact between and for the benefit of sovereign states, but, rather, was stated to be and was adopted by the People, for *their* protection.

This system of federalism was adopted by the People for the protection of themselves, i.e., individuals. *See, New York v. United States,* 505 U.S. 144, 181 (1992), O'Connor, J.:

> "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments **for the protection of individuals**."

(Boldface emphasis supplied).

In this respect, the ILC submit that it is manifest also that federalism, with its division of powers and authority between the national and state government,

and its limitations on state powers when they conflict with federal law, was adopted by the People for the *inter alia* benefit, also, of citizens, i.e., individuals, as well as for their protection (which latter is noted by O'Connor, J., for the majority in *New York*).

de Toqueville is informative on this subject:

In *Democracy in America* (1839) he reported on and analysed the allocation of and the conflicts between federal and state powers. He reported that a chief concern of the Framers was "to arm the Federal government with sufficient power to enable to resist, within its sphere, the encroachments of the several states," but, at the same time, to avoid confrontation of the Union directly against a state, wherever possible.

He observed that to that end, that suits by private citizens were deemed to be the **means** by which state laws contrary to the interests of the Union could be attacked without having to bring in the Union as the litigant. Thus:

> The Americans hold that it is nearly impossible that a new law should not injure some private interests by its provisions. **These private interests are assumed** by American legislators **as the means of assailing such measures as may be prejudicial to the Union**, and it is to these [private] interests that the protection of the Supreme Court is extended.

(Boldface emphasis supplied).

Summary of this sub-point:

The federalism cause of action to protect individuals who were intended to be protected by the Constitution in respect to usurpation of limits of power imposed on states by provisions of the Constitution, including the Supremacy Clause, which allocated federal and state powers by limiting state powers, should be affirmed and validated by the Court in the ILC cases at bar, Nos. 09-958 and 09-1158.

B

Several factors suggest to the ILC plaintiffs that there is a federalism cause of action, or that such a cause of action may be recognized as such in cases such as the case at bar.

One factor is that the Court itself has signaled to the profession, and the public, as it were, that there may be such a cause of action, or a need for one, in order, by "giving life to the Supremacy Clause," to preserve in good working order the system of checks and balances, between the federal government and the States, and within the three branches of the federal government.

Thus, the Court in *Green v. Mansour* stated, in a case which had been mooted, that:

> Prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to

vindicate the federal interest in assuring the supremacy of federal law.

As pointed out by de Toqueville, it is unwieldy at best and risky at worst, for States and the federal government to only confront each other in courts, full-scale, *qua* Union, *qua* State.

In Social Security Act cases, in particular, Congress has apparently been unwilling to give the Secretary, its administrator of the various programs of the Act, all the powers to confront a State to enforce the Act, that even a corporate president has, to carry out a corporation's pledged purposes.

Thus the Secretary cannot (as the ILC plaintiffs read the Medicaid Act) even sue to obtain an injunction, when payment rates are too low, to require a State to conform its rate-setting practices, as one example, to the supreme federal law, Section 30A.

All that the Secretary can do is to withdraw all federal funds from a State, if the Secretary finds the State plan or its practices, contrary to the Medicaid Act. This is an atom bomb which no one, obviously, would ever want to be necessary to be used.

It is in this context then, that Medicaid beneficiaries and providers have a role – which, as noted by Alito, J., in the *Pennsylvania Pharm.* case – Congress indicated was a role they were expected by Congress to play. Thus, the House Committee report on 1981 amendments to Section 30A stated that:

> [I]n instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action. (*Id.*, 283 F.3d at 541).

Such a role to be played, of citizens affected by a given federal law or its administration being expected to come to court to prevent their injury therefrom, was reported by de Toqueville as being an expectation of the early legislatures of the Union.

Further, no matter how filled the tax coffers of the Union may be, they can never be enough by which to adequately fund a Secretary to police 50 States in their various administrations of the Act.

And since it is a given that federal funds are short in today's recession environment, the deployment of Medicaid beneficiaries and providers to guard, as it were, their own hen house by salutary suits, which complement and implement the supremacy of federal Medicaid law, is to the great advantage of not only the Federal fisc, but the ability of the Secretary, with limitations of funding, to adequately police the outskirts of the great Roman system known as the Medicaid Act.

Another factor which suggests the viability of a federalism cause of action, is the observation of Kennedy, J., in *Golden State,* 493 U.S. at 118, that the preemption immunity of the taxi company under the Supremacy Clause, (in the prior case, *Golden State*,

475 U.S. 608), "does not benefit the company as an individual."

This being so – that the Supremacy Clause acts *in rem* rather than *in personam* – it follows that the Supremacy Clause is an army with no soldiers to fulfill its function, unless individuals are allowed to defend themselves under the Supremacy Clause in response to violations of the Medicaid Act which injure them, – which vindicates the federal interest in assuring the supremacy of federal law, – for which such a need has been demonstrated, over the half-century life of the Act.

The result of all this is, that Medicaid beneficiaries and providers are the perfect match to the needs of the Secretary (to police transgressions of the States of the Medicaid Act's minimum requirements), and to the function of the Court, of giving life to the supremacy of federal law, in order to preserve the checks and balances of the federalism system.

Summary

The ILC plaintiffs therefore suggest and respectfully request the Court to address, recognize, and articulate in an appropriate order or decision, in the ILC cases in 09-958 and 09-1158, that there is an implied federalism cause of action, arising in favor of beneficiaries and providers in the Medicaid program, to be allowed (when they show the injury requisite for the "stake" requirement of Article III) to file challenges against State violations of the Medicaid Act as

preempted by the Supremacy Clause: which would vindicate the federal interest in assuring the supremacy of federal law.

The wording of Section 30A clearly prohibited the State from reducing provider payments for purely budgetary reason; and, there is no "vague or amorphous" or "broad and non-specific" language in Section 30A which authorizes the State to reduce Medicaid provider payments for purely budgetary reasons, or counsels against injured beneficiaries or providers defending themselves in court whenever the State cuts provider payments for purely budgetary reasons – in flat and deliberate violation of the quality and equal access clauses of Section 30A.

The fact is, which the ILC plaintiffs have chronicled in Part Two, that there have been at least eight lawsuits since the Act began, in which a State was enjoined by a court for enacting a Medicaid provider payment cut not in compliance with Section 30A, but in defiance of Section 30A: by enacting the payment cut for purely budgetary considerations.

Five of those injunctions, for flagrantly violating Section 30A by cutting provider payments for purely budgetary considerations, were against the Director and his predecessors.

(Three of these have occurred in the past three years.)

These payment cuts, for purely budgetary reasons, cannot possibly have been caused by any "ambiguous" or "vague and amorphous" wording of Section 30A, which the Director, joined by the United States, seek to tag Section 30A: even though this "ambiguous" claim was removed as a claim for review when the Court denied certiorari to the Director, on this issue (which was the central part of the Second Question Presented by Director).

To put it another way: There is nothing so vague and ambiguous about Section 30A, that prevented eight successive courts to eight times rule, that Section 30A clearly precludes a State from basing provider payment rate cuts, solely on budgetary considerations.

So to this degree – which is the only relevant degree to which this comes into these cases at all – Section 30A is very, very clear: so clear that the Director has been told five times over by the federal courts, that Medicaid provider payments cannot be cut, solely for budgetary reasons.

What is there not to understand about that?

In sum, Section 30A is a very clear statement that the State may not do what it did in these cases – namely, ignore the provisions of Section 30A, and reduce provider payments for purely budgetary reasons.

Conclusion

The purported issue of "ambiguity" is irrelevant in the case at bar because it is manifest that California always knew, from reading Section 30A and the injunctions served on it, that it is federally illegal to cut Medicaid payment rates again, solely for budgetary reasons (indeed, in the ILC cases, without even a pretense by the State, otherwise).

"Clear statement" is not at issue in the ILC cases, because the injunctions only speak prospectively.

I.e., it is the impression of the ILC plaintiffs that in past cases defendants were asked to pay damages or attorneys fees or do other future acts, for failure to be informed, **before these obligations were incurred**, that the State would have to undertake such burden when it accepted federal funding in a federal program.

That is not the case at bar. Here the Director is only being ordered to refrain from doing specified acts in the future. If the State wishes to avoid what it claims is a "cost," it can avoid the "cost" by not taking the federal money in the future.

THE DIRECTOR AND THE GOVERNMENT JOIN IN THEIR BRIEFS TO RAISE A DEFAULT DEFENSE WHICH IS WITHOUT MERIT

The new defense of the Director and Government is that there can be no implied Supremacy Clause cause of action, to prevent being injured from State violation of a supreme federal law, unless the State law in question regulates the conduct of the plaintiff in some way, and the "regulated person" sues to enjoin the preempted State regulatory law. (Dir. Brief 43-44; Govt. Brief 19-24).

This new proposed limitation on the scope of the Supremacy Clause, to only situations where a person is regulated by some State regulatory law, may be called, for convenience, a "pre-enforcement suit," to separate it from the broader, unlimited "preemption suit" which the Supremacy Clause authorizes and permits.

1. The all-inclusive wording of the Supremacy Clause repels the construction proposed by the Director and the Government: that only "pre-enforcement" causes of action exist under the Supremacy Clause

The words of the Supremacy Clause are clear: they include **all** preemption suits to prevent injury to a person from a State's violation of a supreme federal law, such as Section 30A, not, just "pre-enforcement" suits which the Director and the Government, in

vain, assert to the Court for the first time in its history, are the only suits which may possibly be filed under the Supremacy Clause, to prevent being injured from preempted State action.

There being no words of limitation or exception from this clear sentence, it follows that the Clause applies to all preemption suits in equity which seek a remedy in equity to prevent being injured from a State's violation of a federal law, **not, just to some** preemption suits – i.e., only to so-called "pre-enforcement suits" – (save and except of course, such Supremacy Clause suits in which the claims may not meet prudential standards, or, some insurmountable Eleventh Amendment problem is encountered).

Hence this defense of the Director and the Government is facially contradictory to the plain meaning of the words of the Supremacy Clause: hence should be rejected by the Court on this basis alone.

2. Supremacy Clause cases include many cases in which the preempted State law does not involve "regulation" of the plaintiff's conduct

The following are just a few of the many Supremacy Clause cases in which the preempted State law did not regulate the conduct of the plaintiff: *Golden State,* 475 U.S. 608 (1986), – in which summary judgment against a Supremacy Clause preemption action was overruled by the Court – the defendant's conduct was regulated by the NLRA, not,

the conduct of the plaintiff); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Board of Liquidation v. McComb*, 92 U.S. 531, 540-541 (1876) (Contracts Clause); and *Baltimore & Ohio R. Co.*, 114 U.S. 311, 314-317 (1885) (Contracts Clause).

(A Contracts Clause violation claim necessarily involves the Supremacy Clause.)

The Constitution also prohibits a State from entering into any treaty, alliance, or confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; ex post facto law, or grant any title or nobility.

But, none of these – all of which come under the Supremacy Clause if violated by a State – involve any State regulation of the conduct of a putative plaintiff.

In sum, the many Supremacy Clause cases or types of cases which do not fit the Government's default theory, destroy the theory.

3. Nothing in any of the cases or authority cited by the Director discuss or support this new proposition of the Director. Hence the proposal is entirely unsupported by the decisions which are cited for its support.

4. The proposed classification would facially violate the Due Process and Equal Protection rights of all persons so excluded, **including the ILC plaintiffs**, by depriving them of their right to sue to prevent being injured from State action which

violates the Constitution, a federal law, or a treaty of the United States.

THE CLAIM THAT THE MEDICAID ACT FORECLOSED SUPREMACY CLAUSE SUITS, HAS ALREADY BEEN REJECTED BY THE COURT SEVERAL TIMES

There is no evidence in the text or structure of the Medicaid Act that Congress intended to specifically foreclose any ability of beneficiaries or providers to sue to obtain a remedy under any provision of the Act. *See Blessing v. Freestone,* 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 521 (1990), that federal government's power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, accompanied by limited state grievance procedures for individuals was insufficient to preclude reliance on a cause of action for preemption.

Also, *see,* the seminal case of *Rosado, supra,* 397 U.S. at 420

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are not reluctant to

assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). We adhere to *King v. Smith*, 3921 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief."

THE BRIEF OF THE UNITED STATES (PAGES 31-32), JOINED IN BY THE DIRECTOR, IS ESSENTIALLY A MOTION TO DISMISS THE PENDING ILC CASES IN 09-958, AND 09-1158, ON THE BASIS THAT SECTION 30A FORECLOSES THESE CLAIMS

THIS *DE FACTO* REQUEST SHOULD BE DENIED

The objection of the United States (Govt. Brief 31-32) is too late, and disregards that Congress, in Section 30A, did not foreclose access to the courts to Medicaid beneficiaries and providers to prevent injury from State action contrary to, hence preempted by, Section 30A.

First

As stated in the preceding Point, Congress did not foreclose access to the courts to beneficiaries and providers in respect to the provider-payment statute, Section 30A. Hence, it follows that Congress intended the courts to be open to them, not closed, as erroneously proposed by the United States.

Second

The Government's proposal furnishes no remedy to beneficiaries or providers.

The Medicaid Act affords no right to beneficiaries or providers to apply to or obtain any relief from the Secretary, when as has been repeatedly done during the past 47 years (see the cases cited by the ILC plaintiffs prior in this Brief), a State reduces provider payments solely for budgetary reasons, in knowing violation of Section 30A.

Please note that neither Medicaid nor the Secretary allow beneficiaries or providers any administrative remedies, such as FERPA allowed students in *Gonzaga,* such as: right to file a written complaint, which the agency then investigates; with the school required to respond in writing; with the agency then prescribing in writing, if a violation is found, what steps the institution must take to comply with FERPA, as to which *Gonzaga* held (536 U.S. at 289-290):

> "These administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism . . . "

Third

The United States is guilty of laches here.

It only objects after thousands of providers in California have been paid, and taken ownership rights in the ten percent or the five percent amounts which were required by the injunctions in these cases, to be paid to them.

So for the Court to in effect order the dismissal of the complaints of the ILC plaintiffs in these ILC cases in 09-958 and 09-1158, by reversing the appeals court decisions, not on the merits but **for the reasons stated by the United States** (Govt. Brief 31-32), would result tomorrow in the Director simply deducting an amount equal to the millions of $$$ which the Director paid under the relevant injunctions, from the warrants which are issued at regular intervals to providers in the Medicaid program in California.

This would in turn thrust the courts of California into another paroxysm of litigation between providers and the State over who owns those amounts which were paid out under the injunctions issued in these ILC cases: – when instead, the whole issue of who is entitled to those funds, could instead be effectively

determined in the within two lawsuits of the ILC plaintiffs, in 09-958 and 09-1158, on the merits.

Thus, since the federal courts first acquired and responsibly exercised jurisdiction on the issue of who should be paid these millions of $$$, it follows that (1) the Court should reject this late objection of the United States, and (2) **not** reverse the appeals court on **such non-merits** ground, but instead, (3) decide all issues relevant to these two cases, including who, ultimately, owns the funds which have been paid to providers as a result of the injunctions issued in 2008 and 2009 in 09-958 and 09-1158.

CONCLUSION AND PRAYER

For the reasons stated, the judgments below should be affirmed.

Dated: July 29, 2011

Respectfully submitted,

LYNN S. CARMAN
8 Waterbury Lane
Novato, CA 94949-8239

STANLEY L. FRIEDMAN
445 S. Figueroa St., 27th Floor
Los Angeles, CA 90071-1631

FOR ARGUMENT

Nos. 09-958, 09-1158, and 10-283

FILED
JUL 29 2011
OFFICE OF THE CLERK
U.S.

BRIEFS
AND

IN THE

Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *et al.*, *Petitioners*,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENTS SANTA ROSA MEMORIAL HOSPITAL, ET AL., NO. 10-283

MICHAEL S. SORGEN
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton Street, 9th Fl.
San Francisco, CA 94108
(415) 956-1360

DEAN L. JOHNSON
DEAN L. JOHNSON, INC.
6863 Tanzanite Drive
Carlsbad, CA 92009
(760) 603-0022

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
LOWELL J. SCHILLER
AMY L. HANKE
JOSHUA J. FOUGERE
LYNDSAY N. HUOT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents in No. 10-283

* Counsel of Record

July 29, 2011

Library of Congress
Law Library

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether there is an equitable right of action under the Constitution to enjoin state officials from implementing and enforcing state laws that violate Section 30(A) of the Federal Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A).

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the brief in opposition of respondents Santa Rosa Memorial Hospital et al., No. 10-283, is incorporated herein by reference. No amendments to that statement are necessary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Federal Medicaid Program.	3
B. California Medi-Cal Program.	5
C. Procedural Background.	7
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE SUPREMACY CLAUSE SUPPORTS A RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.	12
A. A Preemption Claim Under The Supremacy Clause Is Consistent With The Original Understanding Of The Framers.	13
B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.	18
C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.	22
1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.	22

TABLE OF CONTENTS—Continued

Page

2. The Analysis Applied In Statutory Right Of Action Cases, Including *Gonzaga* and *Sandoval*, Does Not Apply To Constitutional Claims. 26

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE. 31

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted..... 32

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim..... 36

III. CONGRESS DID NOT BAR RESPONDENTS' CLAIMS FOR INJUNCTIVE RELIEF AND PRUDENTIAL STANDING PROVIDES NO BASIS FOR DENYING RESPONDENTS ACCESS TO THE FEDERAL COURTS..... 41

A. Section 30(A) Does Not Bar These Claims..... 42

B. The Prudential Standing Doctrine Does Not Bar These Claims..... 47

CONCLUSION 50

TABLE OF AUTHORITIES

SES Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 10, 27, 30, 39
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 25
Ark. Dep't of Health & Human Servs. v. *Ahlborn*, 547 U.S. 268 (2006) 18, 33, 39, 43
Astra USA, Inc. v. *Santa Clara Cnty.*, 131 S. Ct. 1342 (2011) 38
Baker v. *Carr*, 369 U.S. 186 (1962) 24, 48
Barnes v. *Gorman*, 536 U.S. 181 (2002) 36
BellSouth Telecomms., Inc. v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270 (11th Cir. 2003) 19
Bennett v. *Arkansas*, 485 U.S. 395 (1988) 33
Bennett v. *Ky. Dep't of Educ.*, 470 U.S. 656 (1985) 36
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 23, 24
Blessing v. *Freestone*, 520 U.S. 329 (1997) 29, 30
Blum v. *Bacon*, 457 U.S. 132 (1982) 11, 33, 34
Bond v. *United States*, 131 S. Ct. 2355 (2011) ..... *passim*
Bush v. *Lucas*, 462 U.S. 367 (1983) 24
Callam Cnty. v. *United States*, 263 U.S. 341 (1923) 18
Cannon v. *Univ. of Chi.*, 441 U.S. 677 (1979) 10, 39, 40
Carlson v. *Green*, 446 U.S. 14 (1980) 23, 24, 43
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 49
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 20
City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 18

TABLE OF AUTHORITIES—continued

Page

Cloverleaf Butter Co. v. *Patterson*, 315 U.S. 148 (1942) 18

Corfield v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) 15

Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) ..... *passim*

Crosby v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) 11, 32, 33

CSX Transp., Inc. v. *Williams*, 406 F.3d 667 (D.C. Cir. 2005) 19

Cummings v. *City of Chi.*, 188 U.S. 410 (1903) 18

Davis v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) 25

Davis v. *Passman*, 442 U.S. 228 (1979) 20, 23

Dobbins v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842) 18

Douglas v. *Seacoast Prods., Inc.*, 431 U.S. 265 (1977) 31

Elizabeth Blackwell Health Ctr. For Women v. *Knoll*, 61 F.3d 170 (3d Cir. 1995) 19

Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004) 49

Exeter Mem'l Hosp. Ass'n v. *Belshe*, 145 F.3d 1106 (9th Cir. 1998) 46

Fallbrook Irrigation Dist. v. *Bradley*, 164 U.S. 112 (1896) 25

First Nat'l Bank of E. Ark. v. *Taylor*, 907 F.2d 775 (8th Cir. 1990) 19

Fla. Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 18

Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 25

TABLE OF AUTHORITIES—continued

Page

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 25, 26, 30
Gade v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) 18
Gen. Talking Pictures Corp. v. *W. Elec. Co.*, 304 U.S. 175 (1938) 49
Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 10, 21, 29, 32
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 10, 26, 28
GTE N., Inc. v. *Strand*, 209 F.3d 909 (6th Cir. 2000) 19
Hodel v. *Irving*, 481 U.S. 704 (1987) 25
Houston v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820) 18
Hui v. *Castaneda*, 130 S. Ct. 1845 (2010) 24
Ill. Ass'n of Mortgage Brokers v. *Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002) 19
King v. *Smith*, 392 U.S. 309 (1968) 33, 36, 37
Lawrence Cnty. v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) ... 18, 21, 33
Local Union No. 12004 v. *Massachusetts*, 377 F.3d 64 (1st Cir. 2004) 19
Loyal Tire & Auto Ctr., Inc. v. *Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006) 19, 29
Maine v. *Thiboutot*, 448 U.S. 1 (1980) 29
MedImmune, Inc. v. *Genentech, Inc.*, 549 U.S. 118 (2007) 48
Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 30, 32
Monroe v. *Pape*, 365 U.S. 167 (1961) 27
Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 46

TABLE OF AUTHORITIES—continued

	Page
Mintz v. *Baldwin*, 289 U.S. 346 (1933)	18
Osborn v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824)	18, 19, 34
Pac. Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)	18
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981)	33, 36
Perez v. *Campbell*, 402 U.S. 637 (1971)	18
PhRMA v. *Walsh*, 538 U.S. 644 (2003)	18, 34, 35
Planned Parenthood of Houston & Se. Tex. v. *Sanchez*, 403 F.3d 324 (5th Cir. 2005)	19
PLIVA, Inc. v. *Mensing*, 131 S. Ct. 2567 (2011)	*passim*
Powell v. *McCormack*, 395 U.S. 486 (1969)	25
Qwest Corp. v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004)	19
R.R. Co. v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873)	18
Raines v. *Byrd*, 521 U.S. 811 (1997)	48
Ray v. *Atl. Richfield Co.*, 435 U.S. 151 (1978)	18
Rosado v. *Wyman*, 397 U.S. 397 (1970)	*passim*
Rowe v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008)	18
Rumsfeld v. *FAIR*, 547 U.S. 47 (2006)	35
Schweicker v. *Chilicky*, 487 U.S. 412 (1988)	24
Shaw v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983)	18, 21
Soc'y for the Propogation of the Gospel v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823)	18

TABLE OF AUTHORITIES—continued

Page

S.-Cent. Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82 (1984) 10, 25
Suter v. *Artist M.*, 503 U.S. 347 (1992) 29, 30
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 21, 24
Townsend v. *Swank*, 404 U.S. 282 (1971) 33
U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 25
United States v. *Stanley*, 483 U.S. 669 (1987) 24
Va. Office for Prot. & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 21
Verizon Md., Inc. v. *Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004) 19
Verizon Md. Inc. v. *Pub. Serv. Comm'n*, 535 U.S. 635 (2002) 21, 32
Vt. Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 21
Weston v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829) 18
Wilder v. *Va. Hosp. Ass'n*, 496 U.S. 498 (1990) ..... *passim*
Wright v. *Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987) 39
Wyeth v. *Levine*, 129 S. Ct. 1187 (2009) 32
Ex parte Young, 209 U.S. 123 (1908) 20
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 25

CONSTITUTIONS

Art. of Confed., art. XIII 13
U.S. Const., art. VI, cl. 2 ..... 29, 32

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

	Page
42 U.S.C. § 1316	4, 12, 44
§ 1320a-7b(d)	35
§ 1320a-10	45
§ 1396a(a)	3, 45
§ 1396c	4, 5, 12
Cal. Welf. & Inst. Code § 14019.4(a) & (c)	35
42 C.F.R. § 430.12	4, 46
§ 430.14	4
§ 430.15	4
§ 430.16(a)	4, 46
§ 430.18	4, 7
§ 430.20	4
§ 430.35(d)	5
§ 430.38	4
§ 430.66	4
§ 430.76(b)	4
§ 447.256(c)	4

RULE

Sup. Ct. R. 14.1(a)	49

LEGISLATIVE HISTORY

H.R. Rep. No. 105-149 (1997)	43
Cong. Globe, 42d Cong., 1st Sess. (1871)	27, 28

SCHOLARLY AUTHORITIES

Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977)	27
Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009)	15

TABLE OF AUTHORITIES—continued

Page

Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085 (2000) 15

Christopher R. Drahozal, *The Supremacy Clause* (2004) 13, 14

Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991) 16

Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* (5th ed. 2003) ..... *passim*

James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998) 15

John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930) 21

Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429 (2003) 17

John E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007) 37

Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000) 31

Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (1915) 17

Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279 (1913) 17

Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909) 21

TABLE OF AUTHORITIES—continued

Page

David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004) 14

Charles A. Wright et al., *Federal Practice and Procedure* (3d ed. 2008) 12

OTHER AUTHORITIES

The Debates in the Several State Conventions on the Adoption of the Constitution (Elliot ed., 2d ed. 1836) 16

The Federalist No. 33 17

The Federalist No. 44 17

The Federalist No. 80 17

The Records of the Federal Convention of 1787 (Farrand ed., 1911) 13, 14, 15, 16, 18

Restatement (Second) of Contracts (1981)... 38

James Madison, *Vices of the Political System of the United States, in* 9 *The Papers of James Madison* 345 (1975) 13

Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918) 17

Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of I gal History* 167 (1965) 17

INTRODUCTION

Two centuries of this Court's precedents support a right of action to enjoin state legislation that is invalid under the Supremacy Clause. See, *e.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003) (*Hart & Wechsler*). The claims in this case—to enjoin the California Department of Health Care Services from enforcing reductions in Medicaid reimbursement rates that California enacted in violation of Section 30(A) of the Medicaid Act—fit comfortably within that line of authority. Neither petitioners nor their *amici* offer any persuasive reason why the availability of preemption claims arising under the Supremacy Clause should now be called into question.

They nevertheless argue that, even if these claims exist generally, they should be disallowed in this particular case because Section 30(A) does not confer a private right of enforcement. Petrs. Br. 15-16; U.S. Br. 10-11. These preemption claims do not, however, seek to "enforce" that provision, or to assert rights granted thereunder. Rather, they vindicate the structural, constitutional interest in the supremacy of national laws. That interest is enforceable in the federal judiciary as a matter of constitutional law, as this Court has "long ... recognized." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001); see also *Bond* v. *United States*, 131 S. Ct. 2355, 2364-66 (2011). Statutory enforcement procedures may provide alternative means by which state violations of federal law can be addressed, but those procedures do not displace a right of action for equitable relief under the Supremacy Clause.

At bottom, it is properly the judiciary's role to decide when injunctive relief should be available to prevent or halt violations by state officials of the Constitution. Thus, the default rule is that traditional equitable power exists to enforce the Constitution's commands, particularly when Congress has not acted expressly and unequivocally to seek to limit the courts' inherent equitable authority.

The need for judicial intervention is particularly evident here. California enacted the rate reductions challenged in this case for the sole purpose of addressing budget concerns, without considering their impact on health care services as required by Section 30(A) of the Act. Those reductions have been squarely held to violate the Act, and this Court has declined to review that question. Indeed, the federal agency responsible for administering Medicaid, the Centers for Medicare and Medicaid Services (CMS), has itself found that these reductions violate the Act. U.S. Pet. Br. App. 1a-3a (No. 09-958).

Yet, absent the injunctions issued in this case, the State could have and would have imposed these unlawful reductions *for the past three years*.[1] CMS does not have the authority to compel compliance with the Act; rather, the only penalty it can impose for a violation is to withdraw the State's federal Medicaid funding. This draconian sanction is rarely sought, however, because it would lead to a result that is contrary to the primary purpose of the Medicaid Act—*i.e.*, to facilitate the provision of health care services to those otherwise unable to obtain them. And, even when sought, this sanction can be imposed only after a lengthy series of negotiations and hearings, a process that can (and often does) take years.

---

[1] The first of these reductions took effect on July 1, 2008.

Permitting California to continue violating federal law with impunity would result in irreparable harm to those least able to bear the burden and would seriously undermine the constitutional structure in a fashion fundamentally inconsistent with two unbroken centuries of this Court's precedent. The claims in this case should be upheld, and the judgment below affirmed.

STATEMENT OF THE CASE

A. Federal Medicaid Program.

Enacted in 1965, the Medicaid Act establishes a cooperative federal-state program under which the federal government assists States to furnish medical assistance for poor, elderly, and disabled individuals. *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (citing 42 U.S.C. § 1396). A State's participation is voluntary, but if it chooses to participate, it must comply with the Act's requirements and implementing regulations. *Id.* A participating State must establish and administer the Medicaid program through a "plan for medical assistance" that has been approved by the Secretary for Health and Human Services (HHS). *Id.* (quoting 42 U.S.C. § 1396a(a)).

A state plan must, among other things, ensure that payments to health care providers "are consistent with efficiency, economy, and quality of care" and "sufficient to enlist enough providers so that care and services are available ... to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). This provision, Section 30(A) of the Act, requires that a State, before reducing reimbursement rates payable to health care providers, must first consider the effect on "the relevant statutory factors [of] efficiency, economy, quality of care, and access." Pet. App. 10-11 (No. 09-958). In particular, the State must make a

determination, based on "responsible cost studies ... that provide reliable data as a basis for its rate setting," that the new rates "bear a reasonable relationship to efficient and economical hospitals' costs of providing quality services, unless the [State finds] some justification for rates that substantially deviate from such costs." *Id.*[2]

Material changes to prescribed reimbursement rates require an "amendment" to the State's Medicaid plan, and generally cannot be implemented until reviewed and approved by CMS (the operating department in HHS which oversees Medicaid). 42 C.F.R. §§ 430.12, 430.14, 430.15, 430.20, 447.256(c). An amendment submitted to CMS is deemed approved unless the agency takes formal action within 90 days, either by rejecting the amendment or requesting additional information. 42 U.S.C. § 1316(a); 42 C.F.R. § 430.16(a). A State whose plan is disapproved may seek reconsideration through administrative appeals and, ultimately, judicial review. 42 U.S.C. § 1316(a)(2)-(5), (b); 42 C.F.R. §§ 430.18, 430.38.

A participating State that administers its plan in violation of statutory requirements may be subject to funding-withdrawal proceedings under the Medicaid Act. 42 U.S.C. § 1396c; 42 C.F.R. § 430.66. The State must be afforded "reasonable notice and opportunity for hearing" in these proceedings, 42 U.S.C. § 1396c, to be conducted by a designated agency official, 42 C.F.R. § 430.66. Other interested parties may seek to intervene, *id.* § 430.76(b), but Medicaid providers and beneficiaries cannot initiate these proceedings, *id.* If the State is found to violate the Act, then (contingent on rights to administrative and judicial review) fed-

---

[2] This interpretation of Section 30(A), applied by the courts below, *see, e.g.*, Pet. App. 10-11 (No. 09-958), is not at issue here.

eral Medicaid funding "shall" be withheld until the State demonstrates "that there will no longer be any such failure to comply." 42 U.S.C. § 1396c; see 42 C.F.R. § 430.35(d).

B. California Medi-Cal Program.

California is a participant in the federal Medicaid program. *E.g.*, Pet. App. 2-5 (No. 09-1158). It accepts funding under the Medicaid Act, and is bound by the Act's provisions, including Section 30(A). *Id.* The California implementation plan, as approved by CMS, designates the California Department of Health Care Services (DHCS) as the entity responsible for administering the State's Medicaid program, known as "Medi-Cal." *Id.*

In 2008 and 2009, the California legislature passed three bills reducing Medi-Cal reimbursement rates. The first, Assembly Bill 5 (AB 5), imposed an across-the-board 10% reduction on payments and reimbursement rates for hospitals, physicians, pharmacies, and other health care providers, to be effective July 1, 2008. *Id.* at 190-97 (enacted Feb. 16, 2008). The second, Assembly Bill 1183 (AB 1183), directed that the initial rate reductions would expire on February 28, 2009; thereafter, reimbursement rates would generally be reduced 1% from their pre-2008 levels, except that certain health facilities and pharmacies would be subject to a 5% reduction and hospitals not under contract with the State would be subject to the greater of a 10% reduction in allowable costs or 95% of the applicable average contract rate. *Id.* at 198-217 (enacted Sept. 30, 2008). Finally, Senate Bill 6 (SB 6) reduced the maximum contribution paid by Medi-Cal for wages and benefits relating to

in-home supportive services after July 1, 2009.[3] *Id.* at 218-27 (enacted Feb. 20, 2009). All of these reductions were enacted for the express purpose of addressing the State's budget deficit. See, *e.g.*, *id.* at 197.

Neither the California legislature nor DHCS studied the impact of these rate reductions on health care services prior to their enactment, as required by Section 30(A). Pet. App. 11-12 (No. 09-958); Pet. App. 17-29 (No. 09-1158); Pet. App. 2-3 (No. 10-283). The changes also were not submitted to CMS for approval prior to their initial implementation, as required by the Medicaid program. Pet. App. 11-12 (No. 09-958); Pet. App. 17-29 (No. 09-1158); Pet. App. 2-3 (No. 10-283). Not until September 2008, three months after AB 5 went into effect, did DHCS notify CMS of the changes. U.S. Pet. Br. App. 1a-3a (No. 09-958).

On December 24, 2008, CMS formally responded to DHCS's submission by requesting additional information concerning the State's justification for the rate reductions. *Id.* That request had the effect of postponing the review process, and CMS asked that DHCS provide the relevant information within 90 days. *Id.* DHCS, however, never replied. *Id.* Nearly two years later, on November 18, 2010, CMS notified DHCS that it was denying the amendments. *Id.* CMS explained that it could not approve the amendments because, among other things, "California has not demonstrated that it would meet the conditions set out in [Section 30(A)]." *Id.* The same day, DHCS requested reconsideration, *id.* at 2a, 5a-7a, thereby

---

[3] The California legislature subsequently passed a bill that delays implementation of SB 6 until July 2012, and requires a court to validate the reduction prior to implementation. U.S. Br. 4.

triggering a formal administrative hearing, 42 C.F.R. § 430.18. To date, those proceedings remain pending.

C. Procedural Background.

The claims in this case, challenging AB 5, AB 1183, and SB 6 as inconsistent with Section 30(A) of the Medicaid Act, were brought in five separate lawsuits filed in (or removed to) federal courts in California on behalf of a diverse group of health care providers, Medicaid beneficiaries, and others adversely affected by the rate reductions. Pet. App. 1-38, 54-57 (No. 09-958); Pet. App. 53-54, 61, 95-96, 106-08, 111-12, 128-33 (No. 09-1158); Pet. App. 10-13 (No. 10-283).

In all of these actions, the district courts ultimately entered orders preliminarily enjoining DHCS from implementing the rate reductions. *E.g.*, Pet. App. 94-124 (No. 09-958). The courts held that the reductions were inconsistent with Section 30(A) of the Medicaid Act, and found that the plaintiffs would suffer irreparable harm if the reductions were allowed to go into effect. *E.g.*, *id.* These harms included not only revenue losses to health care providers—which might not be compensable, given the State's sovereign immunity—but also loss of services available to Medi-Cal beneficiaries, as providers would be forced to "turn away" new Medi-Cal patients and restrict services available to those individuals.[4] *Id.* at 108-21. These hardships, the courts found, outweighed the

---

[4] In one of the actions, *California Pharmacists Association* v. *Maxwell-Jolly*, No. 09-722 (C.D. Cal.), the district court initially denied injunctive relief to certain plaintiffs on grounds of insufficient evidence of irreparable harm. Pet. App. 126-27 (No. 09-1158). The Ninth Circuit subsequently reversed that judgment as an abuse of discretion, because courts have recognized that the rate reductions would have precisely those effects. *Id.* at 38-39.

State's budgetary concerns. *Id.* at 121-22; see also Pet. App. 91-104, 133-50, 169-74 (No. 09-1158); Pet. App. 23 (No. 10-283).

In a series of appeals, the Ninth Circuit affirmed the preliminary injunction orders. On the threshold issue of whether plaintiffs had asserted a valid cause of action, it held that these claims were properly brought directly under the Supremacy Clause, without regard to whether they might also be brought under 42 U.S.C. § 1983 or through an implied statutory cause of action. *E.g.*, Pet. App. 58-93 (No. 09-958). "For more than a century, federal courts have entertained suits seeking to enjoin state officials from implementing state legislation allegedly preempted by federal law, and we see no reason to depart from the general rule in this case, or in this category of cases." *Id.* at 83. On the merits of the preemption claims, the court of appeals held that the rate reductions were inconsistent with Section 30(A) of the Medicaid Act, and therefore preempted under the Supremacy Clause, because the reductions had been enacted without the requisite "stud[y of] the[ir] impact ... on the statutory factors of efficiency, economy, quality, and access to care" or "consider[ation of] reliable cost studies when adjusting ... reimbursement rates." *Id.* at 11-12. It also affirmed the district courts' balancing of the equities, and their decision to grant preliminary injunctive relief, notwithstanding the State's assertion that the reductions were necessary in light of budget constraints. *Id.* at 12-13, 28-29.[5]

---

[5] Although not all of the appeals were consolidated, they were all decided consistently and based on substantially the same reasoning. *See, e.g.*, Pet. App. 11-13, 58-93 (No. 09-958); Pet. App. 10-36, 38-40, 44-51, 54-57, 69-82 (No. 09-1158); Pet. App. 1-4 (No. 10-283).

Petitions for writ of certiorari were timely filed with respect to each of the appeals. Two questions were presented: (i) whether the Ninth Circuit properly had held, as a threshold matter, that the Supremacy Clause supports a constitutional preemption claim, and (ii) whether the Ninth Circuit properly had held, on the merits, that the California rate reductions contravene Section 30(A) of the Medicaid Act and are therefore preempted. This Court consolidated the petitions, and granted review only as to the first question. Thus, there is no question now that the state statutes violate Section 30(A) and are preempted; the only issue is whether a federal court has authority to issue injunctive relief to remedy California's established violation of the Supremacy Clause.

SUMMARY OF ARGUMENT

The claims in this case, to enjoin California from enforcing preempted state legislation, are supported by a long and unbroken line of precedent recognizing an equitable right of action under the Constitution to address ongoing constitutional violations. *E.g.*, *Malesko*, 534 U.S. at 74. The claims at issue here cannot be distinguished, as petitioners and the United States would have it, Petrs. Br. 15-17; U.S. Br. 10-11, merely because the federal statute on which they are based also provides an administrative process to withdraw federal funding in response to a statutory violation. That process offers the federal government a means to vindicate its own interests in ensuring a State's compliance with the Act, but they do not affect the rights of individuals adversely affected by unconstitutional state legislation to seek equitable relief in federal court.

1. It is "well-established" that the Constitution itself supports a right of action seeking prospective

equitable relief to address constitutional violations. *Hart & Wechsler*, *supra*, at 903. Scores of opinions from this Court have recognized such claims, and never has the Court so much as suggested that this constitutional right of action depends for its existence on congressional authorization. *Infra* Part I.B-C. Such a prerequisite would be flatly inconsistent with this Court's approach to other structural constitutional provisions that, like the Supremacy Clause, have always been understood to support a claim for prospective equitable relief without need for an authorizing statute. *E.g.*, *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984); see also *Bond*, 131 S. Ct. at 2364-66.

To reaffirm the longstanding recognition of this constitutional right of action would not be an "end run" (Petrs. Br. 35) around decisions like *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), which require "rights-creating" language as a precondition to a statutory cause of action. *Infra* Part I.C.2. Claims seeking to enforce a *statute*, whether 42 U.S.C. § 1983 or any other, arise under the statute and thus are available only when authorized thereby. *E.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). Claims seeking to enforce the *Constitution*, by contrast, arise as a necessary incident of the constitutional structure. *E.g.*, *S.-Cent. Timber*, 467 U.S. at 87; see also *Golden State*, 493 U.S. at 116-17 (Kennedy, J., dissenting); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting). Whatever role Congress may have in crafting adjudicatory mechanisms and remedies for constitutional claims, the Constitution itself empowers the judiciary to entertain suits alleging ongoing constitutional violations, including violations of the Supremacy

Clause, and to abate them when appropriate through prospective equitable relief.

2. This right of action is no less available when the preemption claim implicates a federal statute enacted under authority of the Spending Clause. *Infra* Part II.A. The only relevant issues in the preemption analysis are whether the federal statute is constitutionally applicable to the State and, if so, whether it conflicts with the challenged state law. *E.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). The constitutional basis for the federal statute has never been held relevant to this inquiry, or to the antecedent question of whether a cause of action is available. To the contrary, this Court has repeatedly upheld equitable relief on claims that alleged a conflict between state legislation and requirements of federal spending programs. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 145-46 (1982).

The possibility that federal funding might be withdrawn, or that the State might opt out of the program, does not render an individual preemption claim unnecessary or unavailable. *Infra* Part II.B. So long as the State remains a participant in the federal program, it is subject to the conditions imposed by federal law, and state legislation in contravention thereof is invalid under the Supremacy Clause, whether or not it is "possible" that the conflict might be avoided by a future change in circumstances. *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579 (2011). Regardless of what administrative remedies might be available to the federal government to allow it to vindicate its own interest in enforcing compliance with a federal program, individuals who are adversely affected by unconstitutional state legislation retain the right to seek prospective equitable relief in the federal courts.

3. A right of action under the Supremacy Clause is, in any event, fully consistent with the administrative process contemplated by the Medicaid Act. *Infra* Part III.A. The Act grants CMS authority to review state plans and, when appropriate, to reject those that do not comply with federal law. 42 U.S.C. §§ 1316(a)(1), 1396c. However, it does not define that process as exclusive, or otherwise suggest that individual preemption claims should be precluded. To the contrary, because administrative claims under the Act and preemption claims under the Supremacy Clause pursue complementary objectives—one to enforce compliance with federal law, and the other to enjoin state legislation in conflict with that law—both forms of action can and should be allowed.

The plaintiffs in this case are adversely affected by state laws that have been held unconstitutional and invalid under the Supremacy Clause. *Supra* pp. 7-9. Notwithstanding petitioners' late-raised (and waived) objection based on "prudential standing," Petrs. Br. 49-52, there is no reason that these parties should be denied a right of equitable relief to enjoin operation of those laws. *Infra* Part III.B. The judgment below should be affirmed.

ARGUMENT

I. THE SUPREMACY CLAUSE SUPPORTS A RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.

It has long been accepted, as the United States acknowledges, U.S. Br. 17-18, that the Supremacy Clause supports a claim for individuals to challenge preempted state legislation. *Hart & Wechsler*, *supra*, at 903; see also 13D Charles A. Wright et al., *Federal Practice and Procedure* § 3566, at 289-92 (3d ed. 2008). That principle, although disputed by petition-

ers, Petrs. Br. 33-45, accords with the original understanding of the Supremacy Clause, and two centuries of caselaw thereafter, as well as this Court's decisions in statutory rights cases such as *Gonzaga* and *Sandoval*.

A. A Preemption Claim Under The Supremacy Clause Is Consistent With The Original Understanding Of The Framers.

There is no evidence, notwithstanding petitioners' claims to the contrary, Petrs. Br 35-45, that the Framers of the Constitution would have thought that individuals adversely affected by state legislation invalid under the Supremacy Clause would be unable to seek equitable relief from the federal judiciary. To the contrary, the historical record suggests that they expected and intended such a right of action to be available.

1. The Framers' principal objective in crafting the Supremacy Clause was to establish an effective mechanism by which States could be compelled to adhere to federal law. Christopher R. Drahozal, *The Supremacy Clause* 6-7 (2004); see also, *e.g.*, 3 *The Records of the Federal Convention of 1787*, at 524-29 (Farrand ed. 1911) (Farrand). Although the Articles of Confederation had declared the principle of national supremacy and directed the States to "abide by" and "inviolably observe[ ]" national law, Art. of Confed., art. XIII, they provided no method to enforce that principle, with the result that several States had enacted legislation or exercised powers (such as negotiating treaties with foreign countries) in direct contravention of national law. Drahozal, *supra*, at 6-7; see also James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345, 348-58 (1975).

To remedy this defect, each plan offered at the Constitutional Convention would have given authority to one or more branches of the federal government to invalidate state legislation that was inconsistent with national policy—and, when necessary, to compel adherence. *E.g.*, 3 Farrand, *supra*, at 524-29; see also Drahozal, *supra*, at 6-7. For instance, one plan, offered by the delegates from New Jersey, would have allowed the executive to call forth the military against a recalcitrant State, 1 Farrand, *supra*, at 245; another, associated with the Virginia delegation, would have vested in Congress the power to "negative" state legislation deemed inconsistent with national law, *id.* at 21, 54, 164-65. The proposal ultimately adopted, embodied in the Supremacy Clause, shared the same purpose as other plans but delegated responsibility for enforcing the principle of national supremacy to the judiciary. *E.g.*, *id.* at 168, 313, 322; 2 Farrand, *supra*, at 28-29, 144, 169, 183, 389-91, 417, 603; see also 3 Farrand, *supra*, at 524-29; Drahozal, *supra*, at 20-23.

A private right of action to challenge preempted state legislation is necessary to allow the judiciary to satisfy this constitutional purpose. State legislation can be presented to federal courts only in the context of "cases" or "controversies," *e.g.*, 2 Farrand, *supra*, at 430, and the parties most able to bring these cases—in modern terms, those with "standing"—are those adversely affected by the state legislation. See, *e.g.*, David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 401-03 (2004). Without a right of action, there would be no mechanism by which unconstitutional state laws could be addressed, except in those cases where the State itself elected to bring an enforcement action in the courts, thereby implicating the Supremacy Clause as a defense.

It is inconceivable, given the Framers' recent experience under the Articles of Confederation, *e.g.*, 1 Farrand, *supra*, at 166-67, 316-17, 326, that they would have intended the enforcement of national supremacy to depend on voluntary action by the States. Nor would they likely have viewed the Supremacy Clause as nothing more than a "rule of decision," Petrs. Br. 35, directing States to follow national law—as had the Articles previously—but giving the federal courts no actual authority to invalidate unconstitutional state legislation. See, *e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696. 762 (1998). The Framers understood and intended that the federal judiciary would be open to individuals injured by unconstitutional state legislation and empowered to issue orders declaring state legislation invalid and prospectively enjoining its enforcement. See, *e.g.*, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 706-07 (2009).[6]

2. This understanding is reflected at the Convention and ratification debates. Throughout those proceedings, the Supremacy Clause was consistently described as giving judges authority affirmatively to "set aside" and "declare void" (not merely "decline to

---

[6] There is no support (even in the single source petitioners cite, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085 (2000)) for the suggestion that placement of the Supremacy Clause in Article VI, rather than Article I, somehow militates against recognition of a cause of action to enforce that Clause. Petrs. Br. 41; *cf.*, *e.g.*, *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (addressing claim to enforce Privileges and Immunities Clause of Article IV); *infra* Part I.C.1 (citing cases addressing other constitutional claims).

enforce") state legislation that contravenes federal law. *E.g.*, 2 Farrand, *supra*, at 27-28, 391. Although constitutional remedies and rights of action were not a focus of the Convention, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991), several delegates expressed the understanding that the federal judiciary should entertain claims by "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State," 3 Farrand, *supra*, at 55-56 (Randolph), and that federal judges, when presented with an unconstitutional state law, would be able to grant prospective equitable relief in the form of a "supersedeas," *id.* at 524-29 (Madison).[7] During the ratification debates, both supporters and opponents of the Constitution assumed that the *federal* judiciary would be empowered "in the first instance" to decide the constitutionality of state laws—presumably in actions commenced by individuals, as it would have been unlikely for a State to bring an enforcement action in federal court. *Id.* at 286-87; see also *id.* at 205-07; 3 *The Debates in the Several State Conventions on the Adoption of the Constitution* 266 (Elliot ed., 2d ed. 1836).

This is consistent with the views set forth in *The Federalist Papers*. Petitioners heavily rely (Petrs. Br. 39-40) on a statement by Alexander Hamilton that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institu-

---

[7] The proposal by Edmund Randolph would have allowed the judiciary to invalidate not only state legislation found to be inconsistent with federal law but, further, any state laws deemed "contrary to the principles of equity and justice." 3 Farrand, *supra*, at 55-56; *see also* 1 Farrand, *supra*, at 97-98; 2 Farrand, *supra*, at 73-80.

tion of a federal government." *The Federalist No. 33* (Hamilton). But Hamilton did not state or even suggest that this "truth" was an unenforceable one. On the contrary, in light of the views expressed elsewhere by both Hamilton and James Madison, this statement suggests that they understood a right of action to challenge unconstitutional state statutes to be inherent in the constitutional structure, just as they understood the right of judicial review of federal legislation to be inherent in that same structure. See *The Federalist No. 44* (Madison); *The Federalist No. 80* (Hamilton).

This understanding fits squarely within contemporary legal practice. At the time of the Founding, colonial and English judicial practice permitted individuals to seek redress in equity for injuries resulting from an *ultra vires* act or void law. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-50 (2003).[8] For example, the English Board of Trade accepted and addressed petitions from colonists challenging local acts as inconsistent with English law. *E.g.*, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 50-52 (1915). The English Privy Council adjudicated appeals by colonists alleging that local provisions were "repugnant" to English law. *E.g.*, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279, 287-88 (1913). Petitioners' *amicus* seeks to downplay these procedures as "fundamentally political and administrative in nature," Br. of Nat'l Gov. Ass'n 13, but does not explain

---

[8] *See generally* Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of Legal History* 167, 176 (1965); 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918).

why these analogous practices would not have informed the Framers' understanding of the role of the judiciary in reviewing local legislation. *E.g.*, 1 Farrand, *supra*, at 105, 138-40; 2 Farrand, *supra*, at 73-80 (referring to English practice in addressing judicial review).

B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.

Consistent with this understanding, for nearly 200 years the Court has addressed claims seeking equitable relief against the operation of a preempted state law. *Hart & Wechsler*, *supra*, at 903. There are scores of such cases in this Court alone, just a sampling of which are set forth in the margin,[9] in addition to the unanimous recognition of such a cause of action by every single federal court of appeals to ad-

---

[9] *See, e.g.*, *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *PhRMA* v. *Walsh*, 538 U.S. 644 (2003); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray* v. *Atl. Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942); *Mintz* v. *Baldwin*, 289 U.S. 346 (1933); *Callam Cnty.* v. *United States*, 263 U.S. 341 (1923); *Cummings* v. *City of Chi.*, 188 U.S. 410 (1903); *R.R. Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873); *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *cf. Dobbins* v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842); *Weston* v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829); *Soc'y for the Propogation of the Gospel* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820).

dress the question.[10] These cases were decided in each critical period in the evolution of enforcing constitutional claims against state actors—including, among others, the eras shortly after the Founding; before and after the Civil War and the enactment of § 1983; and throughout the Twentieth Century, both before and after this Court's decisions in cases like *Gonzaga* and *Sandoval*.

As early as 1824, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court held that an entity could seek equitable relief against a state official acting under a state law preempted by the Supremacy Clause. *Id.* at 838. The Court expressly rejected the argument (similar to that offered by petitioners here, Petrs. Br. 35-36) that an individual who "perceives the approaching danger" of an invalid state law "can obtain no protection from the judicial department of the government." 22 U.S. (9 Wheat.) at 847. This Court instead held that it is the "province of [the judiciary], in such cases, to arrest the injury, and prevent the wrong." *Id.* at 845, 847.

---

[10] *See, e.g.*, *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 672-74 (D.C. Cir. 2005) (per curiam); *Planned Parenthood of Houston & Se. Tex.* v. *Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Verizon Md., Inc.* v. *Global NAPS, Inc.*, 377 F.3d 355, 368-69 (4th Cir. 2004); *Local Union No. 12004* v. *Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-78 (11th Cir. 2003) (en banc); *Ill. Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *GTE N., Inc.* v. *Strand*, 209 F.3d 909, 916 (6th Cir. 2000); *Elizabeth Blackwell Health Ctr. For Women* v. *Knoll*, 61 F.3d 170, 185 (3d Cir. 1995); *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 776 n.3 (8th Cir. 1990).

Cases after *Osborn* continued to adjudicate claims for equitable relief directly under provisions of the Constitution, including the Supremacy Clause. See *supra* note 9. These include, among others, *Ex parte Young*, 209 U.S. 123 (1908), which upheld an individual's claim to enjoin state officials from enforcing an unconstitutional state law. *Id.* at 145-65. Certainly a key issue in *Young* was whether such a suit could be brought consistent with the Eleventh Amendment, Petrs. Br. 41, but what is significant here is the Court's acceptance of the fundamental, underlying right of action to enforce the Constitution. Indeed, the decision went out of its way to note the long history of such claims in the federal courts. 209 U.S. at 145-52. And, of course, the very purpose of *Young* was to preclude States from deterring potential plaintiffs from protecting their constitutional rights by threatening to penalize them for non-compliance with the State's unconstitutional requirement. See *id.* By holding that the private party could go to court to enforce the Constitution against state officials, this Court rejected the argument that constitutional provisions are enforceable only as a defense to an enforcement action.[11]

Through the last century and into this one, and despite changing views of the meaning and relevance of the phrase "cause of action," *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 236-44 (1979), this Court has repeatedly entertained affirmative claims to enjoin state officials from implementing preempted state legislation.

---

[11] *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 75-80 (1831) (Thompson, J., dissenting) (a claim for equitable relief against a preempted state law "presents a case for judicial consideration, arising under the laws of the United States," and "an injunction is a fit and proper writ to be issued, to prevent the further execution of such [state] law[ ]").

E.g., *Verizon Md. Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638-39 (2011).[12] In *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for example, the Court held that "[a] plaintiff who seeks injunctive relief from state regulation[ ] on the ground that such regulation is pre-empted [under] the Supremacy Clause ... presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.* at 96 n.14. These decisions "reaffirm[ ] the general rule" that equitable relief is available in the federal judiciary to enjoin state officers from implementing a state law preempted under the Supremacy Clause. *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985).

To be sure, many of these decisions "assum[ed]" the existence of a claim under the Supremacy Clause, while focusing directly on questions of jurisdiction or the like. U.S. Br. 18-19; see, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114-29 (1965). But, it cannot be disputed that these cases reflect an unbroken history of allowing individuals to "vindicate ... preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (concluding that the "long tradition of *qui tam* actions," which the Court had "routinely entertained," was "well nigh

---

[12] *See also supra* note 9; Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930).

conclusive" as to the justiciability of those claims). To hold otherwise, as petitioners request, Petrs. Br. 17-18, would cast doubt upon, if not directly overrule, the holdings of these cases and scores more.

Nor will reaffirmation that preemption claims may be brought directly under the Constitution result in the flood of new lawsuits petitioners and their *amici* prophesize. Petrs. Br. 26-33; Br. of States 12-15. This is for the simple reason that courts uniformly have recognized the availability of claims under the Supremacy Clause. See *supra* notes 9-10; U.S. Pet. Br. 16 (No. 09-958). Respondents merely ask this Court to confirm what is *already* "well-established." *Hart & Wechsler*, *supra*, at 903. Justiciability doctrines will, in any event, properly limit the scope of potential plaintiffs able to bring these challenges. See *infra* Part III.B.

C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.

In none of the cases discussed above did this Court demand "rights-creating" or other authorizing statutory language as a prerequisite to a right of action under the Supremacy Clause. See *supra* note 9. Such a requirement would run counter to a large corpus of cases approving direct claims under other provisions of the Constitution and, contrary to petitioners' claims, Petrs. Br. 14-15, is not mandated by statutory rights cases such as *Gonzaga* and *Sandoval*.

1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.

Claims arising directly under provisions of the Constitution have "long been recognized" by this Court, without need for statutory authorization. *Malesko*,

534 U.S. at 74. Whatever role Congress has in defining and limiting the scope of remedies that are available in these actions, particularly with respect to monetary damages, a claim seeking purely equitable relief to abate an ongoing constitutional violation arises as a necessary incident of the Constitution.

1. This principle underlies *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case, and those that followed from it, held that an individual whose constitutional rights are infringed by a federal official may bring an action in federal court for monetary damages. *Id.* at 392-97; see also *Carlson* v. *Green*, 446 U.S. 14, 19-21 (1980); *Davis*, 442 U.S. at 245-49. No statute authorized these actions, and in some cases Congress had provided alternative remedial schemes for the violations at issue. *E.g.*, *Green*, 446 U.S. at 19-21. Nevertheless, the Court reasoned that a damages remedy should be available to individuals injured by constitutional violations committed by federal officials, in part because 42 U.S.C. § 1983 provides a comparable remedy for violations committed by state officials. *Id.* at 21-22 & n.6, 24-25.

The availability of a *damages* remedy for constitutional claims has, of course, been circumscribed in the years since *Bivens*. *E.g.*, *Malesko*, 534 U.S. at 68. A damages remedy is retrospective in nature, intended to compensate the injured party and deter future violations, and is not strictly necessary to abate an ongoing constitutional violation. *Green*, 446 U.S. at 19-21. For that reason, the Court has generally limited it to circumstances in which the violation could not otherwise be addressed, and has held it unavailable when Congress provided a "meaningful" and "effective" alternative remedial scheme—even if the relief available under that scheme is not precisely the

same. *E.g.*, *Schweicker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 385-86 (1983); see also *Hui* v. *Castaneda*, 130 S. Ct. 1845, 1852 (2010).

The Court has consistently reaffirmed, however—even when disallowing a damages claim under *Bivens*—that claims for equitable relief remain available. *Malesko*, 534 U.S. at 74; *United States* v. *Stanley*, 483 U.S. 669, 682-83 (1987); see also, *e.g.*, *Green*, 446 U.S. at 39 (Rehnquist, J., dissenting). Such claims exist as a matter of constitutional structure and necessity. See *Stanley*, 483 U.S. at 683 (claims for equitable relief "[do] not ask the Court to imply a new cause of action") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983)). While Congress may by statute prescribe procedures for the adjudication and review of constitutional claims, see, *e.g.*, *Swift*, 382 U.S. at 114-15 (three-judge panels), and justiciability doctrines may independently restrict their availability in particular circumstances, see *infra* Part III.B; see also, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), prospective equitable relief is "presumed availab[le] ... against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring).

2. Cases outside the *Bivens* context likewise recognize "direct" constitutional claims seeking equitable relief for violations of the Constitution. *Malesko*, 534 U.S. at 74. Contrary to petitioners' argument, these claims have been approved not only for constitutional provisions that "confer ... substantive 'rights'" but also those—like the Supremacy Clause—that define the "structural relationship between the state and federal governments." Petrs. Br. 17-19.

In fact, there are numerous cases in which this Court has addressed claims arising directly under

"structural" provisions of the Constitution. These include, among others, claims under the Qualifications and Compact Clauses, *e.g.*, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969), as well as under more abstract constitutional principles such as separation of powers, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952).[13] These cases confirm that "structural" provisions of the Constitution, no less than "rights-creating" ones, are enforceable through direct actions in federal courts.

This principle was strongly reaffirmed in a pair of this Court's recent decisions. In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the Court expressly upheld "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." *Id.* at 3151 n.2. It noted that a right to equitable relief for a constitutional violation "has long been recognized" and "[exists] as a general matter, without regard to the particular constitutional provisions at issue." *Id.* (quoting *Malesko*, 534 U.S. at 74).

Just last Term, in *Bond* v. *United States*, 131 S. Ct. 2355 (2011), this Court similarly held that "structural" constitutional provisions like the Tenth Amendment—which do not confer individual "rights" but ra-

---

[13] *See also, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704 (1987) (Takings Clause); *S.-Cent. Timber*, 467 U.S. 82 (Dormant Commerce Clause); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Contracts Clause); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (Dormant Commerce Clause); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896) (Takings Clause); *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) (Contracts Clause).

ther define the relationship between federal and state governments—are nevertheless intended to "protect[ ] the liberty of ... persons" and for that reason may be asserted by an individual in a challenge to government action. *Id.* at 2364-65. In language particularly relevant here, the Court explained that, "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or check-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Id.*

These opinions reject the distinction that petitioners would draw between "rights-creating" and "structural" provisions of the Constitution. Petrs. Br. 17-19. On the contrary, they properly recognize that the Constitution's structural provisions protect individual liberties. *Bond*, 131 S. Ct. at 2363-64. They also explicitly recognize that negative restrictions on governmental power, like the Supremacy Clause, can support a challenge against government action and a claim for prospective equitable relief to abate an ongoing constitutional violation. *Free Enter.*, 130 S. Ct. at 3151 n.2. In arguing that the Supremacy Clause "should be treated differently than every other constitutional claim," petitioners—like the parties in *Free Enterprise* and *Bond*—"offer[ ] no reason and cite[ ] no authority why that might be so." *Id.*

2. The Analysis Applied In Statutory Right Of Action Cases, Including *Gonzaga* And *Sandoval*, Does Not Apply To Constitutional Claims.

"Rights-creating" language is not a prerequisite to claims asserted directly under the Constitution, including preemption claims under the Supremacy Clause. That requirement is applied to claims under 42 U.S.C. § 1983, see *Gonzaga*, 536 U.S. at 282, and

claims implied under federal statutes, see *Sandoval*, 532 U.S. at 286, but it has never been—and, contrary to petitioners' argument, Petrs. Br. 17-19, cannot be—applied to constitutional claims.

a. The remedy provided by § 1983 has, since its enactment, been understood to supplement and complement—but not to supplant—equitable relief already available through a claim under the Constitution itself. *E.g.*, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1154, 1170 (1977); see also *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961). Throughout the debates on the bill that would become § 1983, legislators explained that the statute would offer "*further* redress for violations ... of constitutional rights" and an "*additional*" remedy for individuals injured thereby. Cong. Globe, 42d Cong., 1st Sess. app. 315, 460 (1871) (emphasis added); see, *e.g.*, *id.* at 374, 429, 653. There is no evidence that Congress intended § 1983 to limit or disturb the traditional scope of preemption claims under the Supremacy Clause. To the contrary, supporters and opponents of the bill recognized the historical propriety of claims seeking prospective injunctive relief for constitutional violations, including actions to void unconstitutional state laws. *E.g.*, *id.* at app. 259 ("[T]he remedy [for a State's violation of the Constitution is that t]he Federal courts ... declare[] the statute null and void."); see also, *e.g.*, *id.* at app. 83, app. 221, app. 259, app. 315, 429.

This distinction finds further support in the fact that § 1983 was deemed necessary precisely because it addressed a different class of harms—injuries to federally conferred "rights"—than those remedied by a claim for injunctive relief under the "negative limitations" of the Constitution. *Id.* at app. 83. As one of the bill's sponsors explained:

> [Constitutional] prohibitions upon the political powers of the States are all of such nature that they can be ... enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.... [T]hese [are] the only provisions where it was deemed that legislation was required to enforce the[m] ....

Id. at app. 69; see also *id.* at app. 70. Prospective equitable relief is often not an effective remedy for a completed infringement of an individual's personal "rights," and for that reason a damages remedy was provided in § 1983, both to compensate the individual and deter future violations.[14] *E.g.*, *id.* at app. 50.

This rationale has been understood to justify limiting claims under § 1983 (and analogous damages claims under *Bivens*) to deprivations of federally conferred "rights," *Gonzaga*, 536 U.S. at 285-90, but it has no application to direct constitutional claims for prospective equitable relief. Whereas § 1983 by its

---

[14] The three statements cited by petitioners' *amicus*, far from showing that the framers of § 1983 "believed that its equitable remedies were *new*," Br. of Nat'l Gov. Ass'n 29, establish only that they believed that equitable remedies, in addition to monetary damages, could and should be provided under § 1983 to protect against a violation of federally guaranteed "rights." *See* Cong. Globe, 42d Cong., 1st Sess. at 501 (noting that Congress has authority to enact § 1983, to provide "an original action in our Federal courts [for an] injunction [or] recovery of damages"); *see also id.* at 577 (referring to need to protect federally guaranteed "rights"); *id.* at 376 (same).

terms protects only "rights" guaranteed to individuals under federal law, *id.*, the Supremacy Clause declares broadly that "any Thing in the Constitution or Laws of any State" contrary to the "Constitution[ ] and the Laws of the United States" shall be invalid, without regard to whether the provisions at issue confer "rights." U.S. Const., art. VI, cl. 2; see *Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) ("Preemption [does not] concern[] ... the securing of rights, privileges, and immunities to individuals.").

It is certainly the case, as petitioners and the United States point out, that *some* preemption claims might also be brought under § 1983 because they implicate a particular "right" guaranteed by federal law. Petrs. Br. 34; U.S. Br. 26-27. But that additional, sometime avenue for relief is no reason to hold that § 1983 displaces constitutional preemption claims, any more than it displaces the myriad other constitutional claims that "ha[ve] long been recognized" to coexist with § 1983 (and *Bivens*) claims.[15] *Malesko*, 534 U.S. at 74. And, contrary to the United States' assertion, U.S. Br. 26-27, not all constitutional preemption claims could simply be restyled as § 1983 claims, or vice versa. See, *e.g.*, *Golden State*, 493 U.S. at 107-08; *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006).[16] There

---

[15] The statement in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that when a statute provides no private right of enforcement § 1983 represents the "exclusive statutory cause of action." *id.* at 6, does not on its face suggest that § 1983 is the exclusive vehicle for *non-statutory* claims, *contra* U.S. Br. 28-29, and *Thiboutot* has never been read to support displacement of constitutional claims for equitable relief. *See supra* Part I.C.1.

[16] Indeed, neither of the § 1983 cases cited by the United States for this point—*Suter* v. *Artist M.*, 503 U.S. 347 (1992), and *Blessing* v. *Freestone*, 520 U.S. 329 (1997)—would be ame-

is no basis to restrict preemption claims under the Supremacy Clause to those based on a "rights-creating" statute.

b. Much the same can be said for petitioners' associated argument that constitutional preemption claims should be allowed only when authorized by the underlying federal statute, under the rationale of implied right of action cases like *Sandoval*. Petrs. Br. 20-26. Because the claims at issue in those cases were brought directly under *statutes*, the scope and availability of any cause of action depended on the statute itself. *E.g.*, *Sandoval*, 532 U.S. at 286. Claims under the Supremacy Clause, by contrast, are brought under the Constitution, and exist as a necessary incident of the Constitution's structure. See, *e.g.*, *Free Enter.*, 130 S. Ct. at 3151 n.2; see also *Malesko*, 534 U.S. at 74.

This argument exposes most clearly the flawed premise on which petitioners' position rests: that a preemption claim seeks to "enforce" a federal statute. *E.g.*, Petrs. Br. 20-22; U.S. Br. 30-31; see also Br. of States 2. Although a preemption claim commonly relies for its substance on the scope of a federal statute—to determine, for instance, whether the challenged state legislation impermissibly conflicts with federal law, see *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996)—it does not seek to "enforce" the sta-

---

nable to such restyling. The claims in those cases did not seek to *invalidate* state laws under the Supremacy Clause and enjoin state officials from acting thereunder, as would a traditional preemption claim, but instead sought to *compel* state officials to take affirmative actions under federal statute. *Suter*, 503 U.S. at 352-53; *Blessing*, 520 U.S. at 337. In contrast, the claims in this case are classic preemption claims, in that they seek to declare the challenged legislation invalid and to prohibit petitioners from implementing it.

tute, as would a claim asserting an implied statutory right of action, *Sandoval*, 532 U.S. at 286. Rather, what is "enforced" in a preemption claim is the structural constitutional principle of supremacy, as declared in the Supremacy Clause. *E.g.*, *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271-72 (1977) (preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"); see also Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234 (2000). The rule that compels preemption of contrary state legislation arises not from the federal statute but from the Constitution itself. See, *e.g.*, *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.); cf. U.S. Br. 12 ("The question in these cases ... does not concern the States' substantive obligations under Section 1396a(a)(30)(A)."). It is the Constitution, therefore, that supports a right of action for these claims, without regard to whether the underlying statute might also provide one.

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE.

Petitioners argue in the alternative that, even if preemption claims are generally available under the Supremacy Clause, they should be precluded when the underlying federal statute was enacted under authority of the Spending Clause. Petrs. Br. 46-49. That rule finds no support in this Court's decisions, and is at odds with the constitutional principle of supremacy.

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted.

The Supremacy Clause declares simply that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof," shall be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It does not distinguish between federal statutes based on which constitutional provision authorized Congress to act, and this distinction has never played a role in preemption analysis. See, *e.g.*, *Crosby*, 530 U.S. at 372; see also *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.). Nor is this distinction relevant to whether a preemption claim is available. Such a claim seeks not to "enforce" the underlying statute, but to vindicate the federal structural interest in supremacy. See *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); *Bond*, 131 S. Ct. at 2365; see also *supra* pp. 30-31. That constitutional interest is enforceable in the federal judiciary regardless of the particular authority under which Congress acted, or intended to act.

To be sure, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194 (2009). But this inquiry into congressional intent, to determine "the scope of the statute's pre-empti[ve effect]," *Medtronic*, 518 U.S. at 485-86, goes to the merits of the preemption question, not to the antecedent question of whether a cause of action is available to enjoin the operation of preempted state law. See, *e.g.*, *Verizon Md.*, 535 U.S. at 642-43 (addressing merits of preemption claim without expressly resolving validity of the cause of action). This Court has never held that a state law may operate in contravention of a valid federal sta-

tute because of the particular power under which Congress proceeded. To the contrary, so long as the federal statute is constitutional and applicable, and is contrary to the state law, the state law is invalid, *Crosby*, 530 U.S. at 372, and a preemption cause of action is available.

Federal statutes enacted pursuant to Congress's Article I spending power are no exception. It is well-established that Congress "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), and once a State accepts federal money subject to such conditions, a state law contravening those conditions "runs afoul of the Supremacy Clause." *Lawrence Cnty.*, 469 U.S. at 270; see *Bacon*, 457 U.S. at 145-46 ("Because [the state rules] conflict with a valid federal regulation, they are invalid under the Supremacy Clause.").[17] The only difference between a federal statute enacted under the Spending Clause and one enacted under another constitutional provision, such as the Necessary and Proper Clause, is that a Spending Clause statute is constitutionally applicable to a State only insofar as the State satisfies the condition precedent of accepting federal funding.[18]

---

[17] *See also Ahlborn*, 547 U.S. at 292; *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

[18] There is no merit to petitioners' novel suggestion that the principle of federal supremacy "does not belong" outside areas in which Congress exercises "exclusive ... authority." Petrs. Br. 48. When Congress acts pursuant to its constitutional authority, it displaces conflicting state law, regardless of whether the State would otherwise have authority to maintain that law. *See, e.g.*, *PLIVA*, 131 S. Ct. at 2581-82.

It is therefore unsurprising that, in *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), seven Justices agreed that a plaintiff may bring a preemption claim to challenge a state law as invalid under the Medicaid Act. While these Justices differed over whether preemption had been established on the merits, they agreed on the threshold issue that the claim was available. *Id.* at 662 (plurality); *id.* at 671 (Breyer, J., concurring); *id.* at 687 (O'Connor, J., dissenting). The United States suggests that *PhRMA* "arose in a different context" because the plaintiffs there sought to invalidate a regulation affecting their "primary conduct," U.S. Br. 24, but it is immaterial under the Supremacy Clause whether state legislation regulates "conduct" or limits "benefits." If that legislation contravenes federal law, it is invalid. See, *e.g.*, *Bacon*, 457 U.S. at 145-46 (holding state law excluding individuals from benefits of federal-state program, in violation of program conditions, "invalid under the Supremacy Clause").

To the extent the United States proposes that constitutional preemption claims should be available only when the challenged state law would be subject to affirmative enforcement in an action brought by the State against the individual, U.S. Br. 19-24, such a rule would run counter to a number of this Court's decisions, see, *e.g.*, *Osborn*, 22 U.S. at 838, and the fundamental purpose of the Supremacy Clause, see *supra* Part I.A, in that it would allow States to violate federal law with impunity so long as they crafted their legislation to be essentially self-executing. Moreover, even if adopted, this rule would not preclude all of the claims asserted in this case. The reimbursement rate changes at issue here not only reduce the amounts paid by the State to providers, but also limit the amounts that providers may charge their

patients for services; a provider that charges patients in excess of those rates may be subject to liability in a claim brought by state officials under California law (as well as under federal law). See Cal. Welf. & Inst. Code § 14019.4(a) & (c); see also 42 U.S.C. § 1320a-7b(d). The reductions challenged in this case, thus, regulate the providers' "primary conduct," rendering them potentially subject to state enforcement actions if they do not comply. These parties would therefore be entitled, even under the United States' theory, to assert a preemption claim.

Tellingly, neither the United States nor petitioners cites any support for their suggested distinctions, and for good reason—there is none. No decision of this Court supports the proposition that judicial enforceability of a preemption claim depends on whether the displaced state law regulates "conduct" as opposed to limits "benefits," or on whether the federal law was enacted under authority of one constitutional provision rather than another.[19] In any event, if these considerations were relevant in preemption analysis, they would go to the *merits* of the preemption claim, not its threshold availability. Whether Congress framed a regulatory program as voluntary or cooperative, or only as an "assistance" plan, might influence the interpretation of particular statutory provisions and their preemptive scope. See, *e.g.*, *PhRMA*, 538 U.S. at 662. Those considerations would not, however, affect the existence of a preemption claim, and they offer no ground for denying its availability in one scenario rather than another.

---

[19] Indeed, it is hard to see how such a rule would work in practice, as many federal statutes could be supported under multiple constitutional provisions. *Cf.*, *e.g.*, *Rumsfeld* v. *FAIR*, 547 U.S. 47, 58-59 (2006) (Solomon Amendment could be upheld under either Spending Clause or War Powers Clauses).

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim.

Nor can statutes enacted pursuant to Spending Clause authority be treated differently merely because they are "conditional," and based on a State's continued participation in the federal program. See Petrs. Br. 46-49; see also U.S. Br. 27-31.

1. Petitioners argue that a State's ability to stop accepting federal money—and thereby escape the reach of conditions imposed by a Spending Clause statute—precludes an action under the Supremacy Clause by parties injured as a result of the State's noncompliance. But, although this Court has analogized federal-state programs such as Medicaid to a "contract" between sovereigns, *e.g.*, *Pennhurst*, 451 U.S. at 17, that analogy has not been used to limit the federal statutes' preemptive reach, *e.g.*, *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Indeed, the Court has specifically counseled against extending the analogy in that way. *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) ("[W]e have been careful not to imply that *all* contract-law rules apply to Spending Clause legislation."). Petitioners' argument on this score fails for several reasons.

First, petitioners contend that, because States voluntarily accept the conditions imposed through federal spending legislation, no claim is available to enjoin violations of those conditions. Petrs. Br. 46-49. But, this Court has consistently maintained the propriety of injunctions that compel a State's compliance with federal funding conditions, so long as the State remains subject to those conditions. See, *e.g.*, *King*, 392 U.S. at 333; *Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970); cf. *Pennhurst*, 451 U.S. at 30 n.23 (noting that the Court "would have little difficulty" upholding

an injunction that forced the State to choose between "rejecting federal funds ... or complying with" the conditions placed upon those funds). A State has no right to accept federal funding while at the same time claiming immunity from the federal obligations attached to those funds. *E.g.*, *King*, 392 U.S. at 333. If it finds those conditions unduly burdensome, it may discontinue accepting the funds to which the burden is attached. See *Rosado*, 397 U.S. at 420-21 (explaining that an injunction leaves a State with the "alternative choices of assuming the additional cost of [complying with the federal condition] or not using federal funds").

For this reason, state entities—like petitioners here—have less rather than more reason to complain about a cause of action seeking to hold them to compliance with the federal statute. If the State wishes to avoid the consequences of acting in a fashion inconsistent with federal law, including an action under the Supremacy Clause, it at all times holds the key to its own prison.

Second, there is no basis for allowing only "intended third-party beneficiaries" of the statute to bring a preemption claim when a State violates that statute. Petrs. Br. 34-51; see also U.S. Br. 27-28; Br. of APA Watch 8-14. Although contract law generally allows a third party to "enforce [a] contract" only when it was "made for his benefit," 9 John E. Murray, Jr., *Corbin on Contracts* § 44.1, at 45 (rev. ed. 2007), that principle—even if it were properly applied by analogy in this context—would affect only actions brought under the quasi-contractual statute itself, not preemption actions brought under the Supremacy Clause. As discussed earlier, *supra* pp. 30-31, a preemption action under the Supremacy Clause seeks not to "enforce" the statute, but to prevent injury

caused by operation of a constitutionally invalid state law.[20] In any event, there are affirmative reasons to conclude that Section 30(A), which requires a State to utilize "methods and procedures" that safeguard (among other things) the availability of care and services, was intended to benefit at least some of the diverse plaintiffs in this case. See *infra* Part III.A.

If anything, the analogy to contract law supports the availability of preemption claims based on Spending Clause enactments. Contracting parties operate against a backdrop of default legal rules that govern the interpretation of their agreement. See, *e.g.*, Restatement (Second) of Contracts § 5(2) & cmt. b (1981). When a State accepts federal funding and agrees to be bound by certain conditions, the terms of the relevant "contract" include the constitutional provisions that structure relations between the federal and state governments—including the Supremacy Clause. And, because the Supremacy Clause has for two centuries been treated as providing a cause of action for individuals aggrieved by a preempted state law, *supra* Part I.B, a State that accepts funding under a federal statutory program should understand that a cause of action under the Supremacy Clause will be available to enjoin state action that violates the federal law.

2. A preemption claim under the Supremacy Clause is no less available when, as here, the State's noncompliance with federal law might also trigger a

---

[20] For this reason, the decision in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011), on which both petitioners and the United States rely, Petrs. Br. 34-35; U.S. Br. 25-26, is inapposite. There, the plaintiffs sought to enforce the terms of the statute itself, as embodied in a form contract through which the statute was implemented. 131 S. Ct. at 1345. Here, the claims at issue arise under the Constitution.

withdrawal of funding by the federal government. Whatever authority Congress might have to displace particular constitutional remedies for certain constitutional violations, this Court never has held that an administrative funding-withdrawal mechanism, without more, is sufficient to demonstrate congressional intent to displace a right of action under the Constitution. To the contrary, the Court repeatedly has held that the possibility of federal funding withdrawal does not preclude judicial relief for parties injured by non-complying States. See, *e.g.*, *Rosado*, 397 U.S. at 420 ("We have considered and rejected the argument that a federal court is without power to ... prohibit the use of federal funds by the States in view of the fact that Congress has [delegated] the power to cut off federal funds for noncompliance with statutory requirements."); see also *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 272 (2006) (state law "contravened federal [Medicaid provision] and was therefore unenforceable").[21]

These cases confirm that the possibility of funding withdrawal does not substitute for, and cannot displace, a constitutional preemption claim. Whereas a preemption claim seeks to declare a state law void, the withdrawal of funding effectively accomplishes

---

[21] These decisions are consistent with this Court's approach to claims under § 1983, which this Court consistently has held not to be displaced by funding-withdrawal provisions. *See, e.g.*, *Wilder*, 496 U.S. at 522; *Wright* v. *Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987). Similarly, the possibility of administrative funding withdrawal, without more, is insufficient to override evidence that Congress intended to provide a private right of action under a statute. *See Cannon*, 441 U.S. at 704-06. In this latter category of cases, of course, the relevant inquiry is not whether Congress intended to preclude an action otherwise available, but whether it intended to create a right of action in the first instance. *See, e.g.*, *Sandoval*, 532 U.S. at 286.

the opposite, eliminating the applicability of the federal regulatory program. See *Rosado*, 397 U.S. at 420 ("[The State] is, of course, in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution."). And, although the *threat* of funding withdrawal may be a useful tool in inducing compliance, its actual implementation ultimately harms, rather than helps, those who would bring a preemption cause of action under the Supremacy Clause—the individuals who depend upon or otherwise benefit from federal regulatory programs. Cf. *Cannon*, 441 U.S. at 704-06 (explaining that funding withdrawal is a "severe" tool that "often may not provide an appropriate means" of addressing "isolated violation[s]").

This case clearly illustrates the inadequacy of funding withdrawal as an alternative to preemption claims. Without some mechanism for parties who are injured by the violation of federal law to vindicate federal supremacy, States would be able to enact and enforce unconstitutional reductions in prescribed Medicaid reimbursement rates unless and until a federal administrative body undertook the process necessary to effectuate a withdrawal of federal funds. *Supra* pp. 4-5. That process is often lengthy; here, for example, the administrative process regarding the disapproval of California's *2008* plan amendment is still underway. *Supra* pp. 6-7. Were funding withdrawal the only available option, affected individuals would be left unable to prevent an ongoing constitutional violation in the meantime, including to prevent irreparable harm, and would face the perverse result that the sole "relief" they could hope to achieve—the termination of federal funding—might well leave them even worse off.

More fundamentally, petitioners' argument that the *possibility* of funding withdrawal might displace a preemption claim reflects a critical misunderstanding of the Supremacy Clause. That Clause renders state law that is inconsistent with any currently applicable federal statute invalid and void, whether or not that inconsistency might at some later date be resolved. Just last Term, this Court recognized precisely this point, refusing to uphold a preempted state law based on "conjectures" regarding "hypothetical federal action[s]" that might later validate that law. *PLIVA*, 131 S. Ct. at 2579 & n.6. Likewise here, although there is always a possibility that a withdrawal of federal funding may render the Medicaid Act inapplicable—just as it is hypothetically possible that California may withdraw from the federal program and terminate the Medi-Cal system—those imagined possibilities cannot serve to validate state laws that currently conflict with a federal statute. Nor can they preclude a right of action to challenge those laws under the Supremacy Clause.

III. CONGRESS DID NOT BAR RESPONDENTS' CLAIMS FOR INJUNCTIVE RELIEF AND PRUDENTIAL STANDING PROVIDES NO BASIS FOR DENYING RESPONDENTS ACCESS TO THE FEDERAL COURTS.

In their final alternative argument, petitioners and the United States assert that these particular claims should be disallowed, either because Section 30(A) of the Medicaid Act is inconsistent with a private right of action, U.S. Br. 24-33, or because respondents do not have prudential standing, Petrs. Br. 49-52. Neither point is valid.

A. Section 30(A) Does Not Bar These Claims.

It is axiomatic that claims for equitable relief against ongoing constitutional violations arise under the Constitution itself, not any statute. *Supra* Part I.C.1. The substantive preemption analysis may rest on underlying federal statutes, but the right of action exists separate and apart from those provisions.

That point alone is enough to defeat the argument that Section 30(A) bars these claims. Petrs. Br. 23-32; U.S. Br. 24-33. Because a constitutional preemption claim does not depend on the federal statute at issue, the scope and purpose of Section 30(A) are irrelevant in assessing the availability of these claims.[22] However, even assuming the contrary—*i.e.*, that a preemption claim might be displaced in certain circumstances by the underlying federal statute—nothing in Section 30(A), or the Medicaid Act more generally, has that effect.

1. It is clear, as an initial matter, that Congress did not explicitly preclude these claims. The Medicaid Act contains no express limitation on the rights of injured parties to seek injunctive relief to remedy constitutional violations, based on Section 30(A) or otherwise, and neither petitioners nor their *amici* point to any such language.

---

[22] This is, again, not to say that Congress could not prescribe certain adjudicatory and remedial procedures for constitutional claims. *See supra* p. 23-24. Here, however, petitioners and the United States are arguing not that Congress has defined particular procedures for seeking relief under the Supremacy Clause but, rather, that Congress has precluded that relief entirely, through implicit repeal by operation of Section 30(A). Petrs. Br. 23-32; U.S. Br. 24-33.

If any inference is to be drawn from the statute itself, then, it is that Congress did not intend to disallow private rights of action that would otherwise be available to private plaintiffs. See, *e.g.*, *Rosado*, 397 U.S. at 420 (addressing preemption claim based on Spending Clause statute); *Ahlborn*, 547 U.S. at 272 (same); see also *Green*, 446 U.S. at 20-22. Indeed, this Court so held in *Wilder*, concluding that a cause of action under 42 U.S.C. § 1983 to enforce "rights" created by certain provisions of the Medicaid Act was available because, among other reasons, Congress had not expressly prohibited such claims in the Act. 496 U.S. at 520-21.[23] The same reasoning confirms the availability of the constitutional claims asserted in this case.

2. Notwithstanding the lack of express statutory support for their position, petitioners and their *amici* contend that these claims should be disallowed because they would be "in tension" with the Medicaid Act's regulatory scheme. Petrs. Br. 26. That scheme, they assert, suggests an intent to "centraliz[e] enforcement authority in HHS[ ] and protect[ ] the States from private lawsuits." *Id.*; see also U.S. Br. 25, 30. Nothing in the statute, however, supports this inference or indicates that a preemption claim would interfere with the administrative process.

---

[23] The legislative report cited by petitioners, relating to the 1997 repeal of the so-called "Boren Amendment," Petrs. Br. 32-33, indicates that Section 13(A) of the Act should not "be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive," H.R. Rep. No. 105-149, at 590-91 (1997), but it does not address constitutional preemption claims generally, or those based on Section 30(A) specifically, and provides no basis to hold such claims displaced by the Act.

That process is notably limited in scope. CMS is afforded only the opportunity to review state plans that are formally submitted for its consideration. 42 U.S.C. § 1316(a). Nowhere does the statute address whether or how CMS or others may seek an order directing a State to comply with statutory or regulatory requirements; nor does it set forth any procedures by which CMS could review constitutional violations that may exist independent of, or in connection with, statutory and regulatory violations. And at no point does the Act indicate that those administrative proceedings constitute the exclusive means by which statutory violations may be addressed.

Indeed, in reviewing this very scheme in *Wilder*, the Court concluded that it "*cannot* be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." 496 U.S. at 522 (emphasis added). The Medicaid Act, the Court explained, gave the agency only "limited oversight" over States and was therefore "insufficient" to support the conclusion that Congress intended to foreclose other remedies. *Id.* Petitioners offer no basis to conclude—and there is none—that the same enforcement scheme that was insufficient to displace a statutory claim is, by contrast, sufficient to displace one under the Constitution.

Tellingly, neither petitioners nor their *amici* read the statute as precluding *all* private remedies. For example, petitioners acknowledge that private parties may bring actions against state agencies under § 1983 to enforce other state plan conditions of the Medicaid Act, Petrs. Br. 46-47 n.17, even though those conditions appear in the same general section and are subject to the same administrative enforce-

ment scheme as Section 30(A).[24] That petitioners agree that some private claims are available under the Act, and may be pursued without obstructing the administrative enforcement process, fatally undermines their argument that the claims in this case would somehow "interfere with" or "disrupt" (Petrs. Br. 28) that process.[25]

Nor does any nebulous goal of "national uniformity, consistency, and predictability" in the administration of the Medicaid program, *id.* at 27, compel rejection of these claims. It is clear, as *Wilder* itself recognized, that Congress did not intend to vest "exclusive" authority in HHS to enforce the Act, U.S. Br. 32, but instead anticipated that the federal courts would have a role in the interpretation and enforcement of the Act's provisions. 496 U.S. at 522. Concerns over conflicting judicial interpretations are properly addressed not through *ad hoc* limitations on private rights of action, of the type petitioners and the United States seek, but through standard avenues of judicial and administrative review. If the United States believes that the courts below or others have misconstrued or misapplied Section 30(A), it may ask CMS

---

[24] For example, the same mechanism of plan review and funding withdrawal applies whether a State's noncompliance involves a system-wide failure to provide required process when setting rates, 42 U.S.C. § 1396a(a)(30)(A), or a system-wide failure to provide required process when reviewing denials of benefits, *id.* § 1396a(a)(3). Yet, according to petitioners, the latter provision could support a preemption claim while the former would impermissibly conflict with the administrative review scheme. Petrs. Br. 46-47 & n.17.

[25] Indeed, the Act explicitly preserves such claims, stating that a "provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-10.

to issue a formal interpretation of that provision, which then (if otherwise proper and reasonable) would presumably be binding on federal courts. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). And, to the extent petitioners complain they cannot "predict" what Section 30(A) requires, Petrs. Br. 16, the answer is that they may seek agency review *before* implementing scheduled changes in Medicaid rates—something the State here did not do. *Supra* pp. 6-7. Preemption claims addressing Section 30(A) will not in any way impede the ability of the agency to construe and implement the statute, or of States to operate thereunder.

3. This case vividly illustrates why the enforcement scheme provided by Section 30(A) cannot substitute for a constitutional preemption claim.

States are required to submit plan amendments for approval by CMS whenever there are "[m]aterial changes in State law," 42 C.F.R. § 430.12(c)(1), and CMS must approve an amendment *before* a State may change its reimbursement rates. *E.g.*, *Exeter Mem'l Hosp. Ass'n* v. *Belshe*, 145 F.3d 1106, 1108 (9th Cir. 1998). In this case, however, the State did not submit amendments regarding the changes required by AB 5 and AB 1183 until approximately three months *after* each set of changes went into effect. *Supra* pp. 6-7. As a result, plaintiffs here began to suffer injury from the changes to the State's reimbursement rates before CMS could even begin its review. See 42 C.F.R. § 430.16(a). With no administrative enforcement action possible, and retrospective relief unavailable, a private judicial action seeking injunctive relief is the only means by which plaintiffs like these could avoid irreparable injury as a result of a state law that is void under the Supremacy Clause.

Moreover, the potential for injury is far greater than the several months' lag between implementation of the plan changes and submission of the plan amendments to CMS. In this case, the State ignored CMS's request for additional information on its plan amendment regarding AB 5; yet, CMS did not act to disapprove the amendment until more than *two years* after it was initially submitted. *Supra* pp. 6-7. That decision is now subject to reconsideration proceedings requested by the State, which are still ongoing—more than half a year later. Thus, if petitioners were correct that no claim under the Supremacy Clause was available, there *still* would be nothing to prevent the State from implementing the rate reductions. States seeking to achieve cost savings through acts of noncompliance could do so for years without the possibility of injunction or practical enforcement.

All of this simply confirms what is already required as a matter of constitutional law: a claim seeking injunctive relief against state laws in violation of the Medicaid Act, including Section 30(A), is available to these plaintiffs. That right of action exists separate and apart from the underlying statute and, in any event, is fully consistent with the structure and purpose of Section 30(A) and the Medicaid Act.

B. The Prudential Standing Doctrine Does Not Bar These Claims.

In the final pages of their brief, and for the first time before this Court, petitioners suggest that these claims might be dismissed based on justiciability concerns relating to the prudential standing doctrine. Petrs. Br. 49-52. This argument is raised far too late to be considered now, and in any event is without merit.

It is true as a general matter that justiciability doctrines apply to and limit claims under the Supremacy Clause, just as they limit other causes of action brought in the federal courts. *E.g.*, *Bond*, 131 S. Ct. at 2364-66. Political questions will be dismissed as non-justiciable, *e.g.*, *Baker*, 369 U.S. at 217, and plaintiffs suffering no injury-in-fact from the challenged government action will lack standing under Article III, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 821-26 (1997). It is these doctrines—and not the artificial and unprecedented limitations on Supremacy Clause claims proposed by petitioners—that properly ensure that courts are not "transform[ed] ... into all-purpose regulatory enforcers of Spending Clause enactments." Petrs. Br. 14-15; see also Br. of States 12-15.

One of these doctrines—and the only one that petitioners mention, Petrs. Br. 49-52—is prudential standing. That doctrine, petitioners now argue, bars these claims because they purportedly (i) rest on the rights of a third party (*i.e.*, the federal government), (ii) are not within the "zone of interests" protected by the Medicaid Act, and (iii) constitute "generalized grievances." *Id.*

These arguments have, as an initial matter, been waived. Petitioners acknowledge that they did not raise them in all of the appeals below, and that the Ninth Circuit did not "overtly" address them. *Id.* at 50 & n.19. In fact, the only opinion by the court of appeals to mention "prudential standing" specifically states that the issue has been waived. Pet. App. 90 n.17 (No. 09-958) ("By failing to articulate any argument challenging [plaintiffs'] prudential standing, the Director has waived that argument."); cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 138 (2007) (Court will not consider issues that were not pressed or passed upon below). Not surprisingly,

therefore, prudential standing was raised in none of petitions for certiorari as a ground for challenging the judgment below. There is no reason for the Court to address this late-raised objection for the first time now. See *Gen. Talking Pictures Corp.* v. *W. Elec. Co.*, 304 U.S. 175, 179 (1938) ("One having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue.").[26]

The prudential standing arguments offered by petitioners also lack merit. These claims do not rest on the rights of the federal government, as petitioners allege, Petrs. Br. 51, but are based on individual injuries suffered by these plaintiffs. *Supra* pp. 7-9; see also *Bond*, 131 S. Ct. 2364-66 (claims that secondarily advance interests of federal government do not implicate the prohibition on third-party claims). Nor is this suit outside the relevant "zone of interests": these plaintiffs are seeking to enforce not the Medicaid Act, but the Supremacy Clause, *supra* pp. 30-31, and in any event there is no doubt that they will be injured as a direct result of the State's violation of the Act, *supra* pp. 7-9. And, although those injuries may be "widely shared" among Medicaid providers and beneficiaries, the losses alleged are concrete and real,

---

[26] There would be no basis for petitioners to argue that the question of whether a right of action exists under the Supremacy Clause "fairly include[s]" the separate question of whether these particular claims are barred by the prudential standing doctrine. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Nor could that issue be deemed a "necessary predicate" to resolution of this case, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 389-90 (1994), given that prudential standing is a discretionary doctrine and, even if properly raised and applicable, would not necessarily preclude a court from adjudicating the claims, *see, e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004).

supra pp. 7-9, and are not remotely an abstract "generalized grievance."

These plaintiffs will suffer irreparable harm from the rate reductions challenged in this case. See *supra* pp. 7-9. They are entitled to seek relief from those reductions through a claim arising under the Supremacy Clause.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL S. SORGEN
LAW OFFICES OF
MICHAEL S. SORGEN
240 Stockton Street, 9th Fl.
San Francisco, CA 94108
(415) 956-1360

DEAN L. JOHNSON
DEAN L. JOHNSON, INC.
6863 Tanzanite Drive
Carlsbad, CA 92009
(760) 603-0022

CARTER G. PHILLIPS*
ERIC A. SHUMSKY
QUIN M. SORENSON
LOWELL J. SCHILLER
AMY L. HANKE
JOSHUA J. FOUGERE
LYNDSAY N. HUOT
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents in No. 10-283

* Counsel of Record

July 29, 2011

RECORD AND BRIEFS

Nos. 09-958, 09-1158, and 10-283

SEP 1 - 2011

In the
Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
*Counsel of Record
SUSAN M. CARSON
JENNIFER M. KIM
Supervising Deputy Attorneys General

GREGORY D. BROWN
CARMEN SNUGGS
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1382
Fax: (415) 703-5480
Email: Karin.Schwartz@doj.ca.gov
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036-3306
(202) 326-6010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

Introduction 1

Argument 4

I. Respondents Cannot Judicially Enforce § 30(A) Because Congress Has Not Provided for a Private Right of Action 4

II. Private Parties May Not Use a Preemption Theory to Enforce § 30(A) 10

A. Neither the Supremacy Clause, Nor Equity, Supplies Private Parties with a Cause of Action to Enforce § 30(A) 10

B. Preemption Is Not Available to Enforce § 30(A), a Funding Condition, in Contravention of Congressional Intent 27

C. Prudential Standing Principles Bar Respondents' Claims 34

Conclusion 36

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) .....*passim*

Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).....26

Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006) 17

Barnes v. Gorman, 536 U.S. 181 (2002).....28, 29

Bennett v. Spear, 520 U.S. 154 (1997) 35

Blessing v. Freestone, 520 U.S. 329 (1997) 3, 19, 20

Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U.S. 276 (1909) 16

Bond v. United States, 131 S. Ct. 2355 (2011).....23

Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491 (1984).....15

Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., 507 U.S. 218 (1993).....17

Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).....15

Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121 (1971).....17

Cal. Pharm. Ass'n v. Dep't of Health & Human Servs., No. C-91-0846-DLJ, 1991 U.S. Dist. LEXIS 13891 (Sept. 13, 1991) 9

Campbell v. Hussey, 368 U.S. 297 (1961) 18

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)..... 9

TABLE OF AUTHORITIES – Continued

Page

Cavanaugh v. Looney, 248 U.S. 453 (1919).....13

Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).....30

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).....5, 6

Choctaw, Okla., & Gulf R.R. Co. v. Harrison, 235 U.S. 292 (1914).....16

City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).....18

Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987).....3, 35

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).....17

Cummings v. City of Chicago, 188 U.S. 410 (1903).....15

Dalton v. Little Rock Family Planning Servs., 516 U.S. 474 (1996).....18

Dalton v. Specter, 511 U.S. 462 (1994).....26

Davis v. Passman, 442 U.S. 228 (1979).....1, 5, 27

Dennis v. Higgins, 498 U.S. 439 (1991).....5, 24, 25

Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977).....15

Edelman v. Jordan, 415 U.S. 651 (1974).....17

Ex parte Young, 209 U.S. 123 (1908).....*passim*

Exeter Mem. Hosp. Ass'n v. Belshe, 145 F.3d 1106 (9th Cir. 1998).....33

TABLE OF AUTHORITIES – Continued

Page

Foster v. Love, 522 U.S. 67 (1997) 17

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 23, 24

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) 19

Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713 (1865) 18

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) ..... *passim*

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) ..... *passim*

Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010) 18

Harmon v. Brucker, 355 U.S. 579 (1958) 26

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006) 31

Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655 (1873) 21

Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 17

Hines v. Davidowitz, 312 U.S. 52 (1941) 15

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) 13

Hughes v. Trustees of Morden Coll., 27 Eng. Rep. 973 (Ch. 1748) 22

I.N.S. v. Pangilinan, 486 U.S. 875 (1988) 21

TABLE OF AUTHORITIES – Continued

Page

Kesler v. Dep't of Pub. Safety, 369 U.S. 153 (1962) 7

Lance v. Coffman, 549 U.S. 437 (2007) 18

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985) 15

Maine v. Thiboutot, 448 U.S. 1 (1980) 17

Malone v. White Motor Corp., 435 U.S. 497 (1978) 15

Morales v. Trans World Airlines, 504 U.S. 374 (1992) 12

N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519 (1979) 15, 19

Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824) 2, 14, 16

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) ..... *passim*

Pennoyer v. McConnaughy, 140 U.S. 1 (1891) 22

PhRMA v. Walsh, 538 U.S. 644 (2003) 29

Poindexter v. Greenhow, 114 U.S. 270 (1885) 22

Pub. Utils. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) 12

Ray v. Atl. Richfield Co., 435 U.S. 151 (1978) 18

Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874) 2, 20, 21

Rosado v. Wyman, 397 U.S. 397 (1970) 17

TABLE OF AUTHORITIES – Continued

Page

Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) 4, 5, 30

Scott v. Donald, 165 U.S. 107 (1897) 22

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 3, 19, 20

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 15

Suter v. Artist M., 503 U.S. 347 (1992) 33

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 6

Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118 (1939) 22, 23

Terrace v. Thompson, 263 U.S. 197 (1923) 12, 22

Townsend v. Swank, 404 U.S. 282 (1971) 29

United States v. Locke, 529 U.S. 89 (2000) 9

Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632 (2011) 12, 25

W. Union Tel. Co. v. Andrews, 216 U.S. 165 (1910) 13

Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007) 15

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) 4, 33

Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986) 19, 30

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 30

Zambrano v. Reinert, 291 F.3d 964 (7th Cir. 2002) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

20 U.S.C. § 1403(a) 33

20 U.S.C. § 1403(b) 33

28 U.S.C. § 2281 6

42 U.S.C. § 503(a)(1) 17

42 U.S.C. § 1320a-2 34

42 U.S.C. § 1320a-10 34

42 U.S.C. § 1396a(a)(23) 31

42 U.S.C. § 1396a(a)(30)(A) ..... *passim*

42 U.S.C. § 1396c 8, 28

42 U.S.C. § 1396p 17

42 U.S.C. § 1983 ..... 17, 20

42 C.F.R. § 430.33 28

42 C.F.R. § 430.35 28

42 C.F.R. § 430.35(d) 8

42 C.F.R. § 430.38 28

42 C.F.R. § 430.42 28

42 C.F.R. § 430.48 28

California Welfare and Institutions Code
§ 14019.4 ..... 22, 23

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Appointments Clause, U.S. Const., art. II, § 2, cl. 2 24

Commerce Clause, U.S. Const., art. I, § 8, cl. 3 5

Elections Clause, U.S. Const., art. I, § 4, cl. 1 ..... 17, 18

Spending Clause, U.S. Const., art. I, § 8, cl. 1 ..... *passim*

Supremacy Clause, U.S. Const., art. VI, cl. 2 ..... *passim*

U.S. Const., amend. X 23

U.S. Const., amend. XI 32, 33

U.S. Const., art. II, § 3 5

U.S. Const., art. III 1, 11, 19

OTHER AUTHORITIES

Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969) 14

Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777 (2004) 20

Brief of Appellants, *Cal. Dep't of Human Res. Dev. v. Java*, S. Ct. No. 70-507, 1970 WL 136861 (Dec. 2, 1970) 17

Brief for the United States as Amicus Curiae, *Douglas v. Indep. Living Ctr. of S. Cal.*, No. 09-958 (Dec. 3, 2010) 8, 20, 29, 34

John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008) 12

TABLE OF AUTHORITIES – Continued

Page

John Norton Pomeroy, *A Treatise on Equitable Remedies* (1905) 12, 22

John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (3d ed. 1905) 21

Joseph Story, *Commentaries on Equity Jurisprudence* (14th ed. 1918) 21

Philip Hamburger, *Law and Judicial Duty* (2008) 2, 20

Roger Foster, *A Treatise on Federal Practice in Civil Cases* (1892) 14, 20

S. Ct. Rule 14.1(a) 35

S. Rep. No. 94-1240 (1976) 32

Supplemental Brief of Petitioners, *Douglas v. Cal. Pharm. Ass'n*, S. Ct. No. 09-1158 (Dec. 20, 2010) 33

INTRODUCTION

Respondents offer an unbounded and ahistorical theory of private enforcement of federal statutes. They suggest that Article III standing is all that a private party must establish to judicially enforce a federal law against a state. So long as there is an "injury," there is a lawsuit; congressional intent to permit private enforcement is irrelevant. *Santa Rosa* Resp. Br. 42 ("[T]he scope and purpose of Section 30(A) are irrelevant in assessing the availability of these claims."); *Dominguez* Resp. Br. 29-37 (arguing that Congress's intent not to create any privately enforceable rights is irrelevant). Were Respondents' theory adopted, private litigation over federal statutes would entirely eclipse the administrative enforcement mechanisms created by Congress, as anyone affected by enforcement of a federal statute could sue if they disagreed with how a state was implementing it.

I. This Court's precedents authorize private actions to enforce federal statutes only where Congress intended to permit such private actions – and thereby prevent exactly this sort of wholesale reallocation of legislative and executive branch power and responsibility to the judiciary. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Davis v. Passman*, 442 U.S. 228 (1979). As Respondents have irrevocably conceded, under these precedents, Congress did not confer any privately enforceable rights in enacting 42 U.S.C. § 1396a(a)(30)(A). Respondents suggest that

this Court should create a private remedy anyway, based on a distorted description of the record, the Ninth Circuit's holdings, and the enforcement powers of the United States Department of Health and Human Services (HHS). HHS's enforcement options are more nuanced and flexible than Respondents suggest, and any arguments that they are inadequate should be made to Congress rather than the courts.

II. Neither the Supremacy Clause nor the federal courts' equity jurisdiction supplies the means to circumvent congressional intent.

A. Largely abandoning the Supremacy Clause as the vehicle for their claims, Respondents shift focus to the courts' equity jurisdiction, which they contend supplies a private cause of action to anyone who claims injury based on a "conflict" between federal and state law. However, equity was never as expansive as Respondents suggest, but provided relief through established forms of proceeding. *See Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874); Philip Hamburger, *Law and Judicial Duty* 338-39 (2008). Respondents' claims do not fit within the bill to restrain proceedings at law at issue in *Ex parte Young*, 209 U.S. 123 (1908); the bill to enjoin trespass upon personal property at issue in *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); or any of the other remedies-based causes of action in the federal equity cases they cite. Moreover, the availability of private equitable relief for purported violations of federal statutes has long been circumscribed by such concerns as separation-of-powers and respect for state

sovereignty. *See, e.g.*, *Sandoval*, 532 U.S. 275; *Blessing v. Freestone*, 520 U.S. 329 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1.

B. Even if a standalone preemption claim could be asserted in other contexts, Respondents could not use such a vehicle to enforce § 30(A) for two reasons. First, Respondents' cases lack the "repugnancy" element that is so critical to the Supremacy Clause. The allegation that the State has failed to satisfy a statutory funding condition sounds more in contract than it does in the Constitution. Second, Respondents cannot rely on preemption to frustrate congressional intent to vest enforcement of § 30(A) in an administrative agency. Respondents plumb the legislative history of § 30(A) and the Medicaid Act in an attempt to find evidence of contrary intent that does not exist. The legislative history on which Respondents rely invariably concerns *other* provisions of the Medicaid Act that *have* been held to confer privately enforceable rights.

C. Several different strands of prudential standing also bar Respondents' claims. The State has preserved these arguments (although not every strand was preserved in all of the underlying seven appeals). Respondent providers' arguments that they fall within § 30(A)'s zone of interest is premised on the wrong legal standard, and they cannot satisfy the correct one. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

ARGUMENT

I. RESPONDENTS CANNOT JUDICIALLY ENFORCE § 30(A) BECAUSE CONGRESS HAS NOT PROVIDED FOR A PRIVATE RIGHT OF ACTION

Respondents lack a private cause of action to enforce § 30(A) because Congress did not create one. Respondents concede that, unlike other provisions of the Medicaid Act, § 30(A) does not create any individualized "rights," whether to a specific level of access, a specific level of provider payments, or anything else. *See Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). To the contrary, the text and structure of § 30(A), and the relevant legislative history, confirm congressional intent that this federal statute be enforced administratively by HHS rather than through private suits. *Id.* at 1059-62; Pet. Br. 29-33. Because Congress "controls the availability of remedies for violations of statutes," and because Congress has not provided a private remedy here, Respondents lack a cause of action to enforce § 30(A). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, the Ninth Circuit's judgments in the underlying appeals must be reversed.

1. There is nothing "talismanic" (*Cal. Pharm.* Resp. Br. 15) about the application of this Court's precedents here, rooted as they are in separation-of-powers principles. Specifically with respect to funding provisions such as § 30(A), Congress must "'speak[] with a clear voice,' and manifest[] an 'unambiguous'

intent to confer individual rights" for such statutes to be privately enforceable. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). Requiring clear and unambiguous evidence of congressional intent to confer individualized rights prevents the exercise by the judiciary of powers belonging to the legislative branch (with which lies the power to enact laws and to provide for their enforcement), and the executive branch (with which falls the duty to "take Care that the Laws be faithfully executed"). *See Sandoval*, 532 U.S. at 286; *Davis v. Passman*, 442 U.S. 228, 241 (1979); U.S. Const., art. II, § 3. That evidence is lacking here, as Respondents concede. *Sanchez*, 416 F.3d at 1059-62. Applying *Gonzaga*, *Pennhurst*, and *Sandoval* will ensure that Congress's intention to provide for centralized administrative enforcement of § 30(A) by HHS is respected rather than undermined.

2. Respondents cannot avoid these precedents by characterizing their claims as "constitutional." It is true this Court has explained that, in contrast to statutory rights, "the judiciary is . . . the primary means through which [constitutional] rights may be enforced." *Davis*, 442 U.S. at 241. There are, however, no constitutional "rights" at issue here. The Supremacy Clause, the only provision of the Constitution upon which Respondents rely, does not confer substantive rights. *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (in contrast to the Commerce Clause, the Supremacy Clause is "'not a source of any federal rights'"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S.

600, 613-15 (1979); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

The cases upon which Respondents rely confirm only that the Supremacy Clause supplies a rule of decision. *See, e.g., Cal. Pharm.* Resp. Br. 22-23. That the Supremacy Clause supplies a rule of decision in suits asserting conflicts between state and federal law does not render such suits "constitutional." As the Court explained in *Swift & Co. v. Wickham*, "[t]he declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes[,] but *this superiority for present purposes involves merely the construction of an act of Congress*, not the constitutionality of the state enactment." 382 U.S. 111, 121 (1965) (emphasis added, internal quotations omitted). Thus, in *Swift*, this Court held that the claim that a state regulatory statute violated a federal statute was not "upon the ground of the unconstitutionality of such statute," a requirement for a three-judge tribunal under former 28 U.S.C. § 2281. *Id.* at 126-27; *see also Chapman*, 441 U.S. at 612-15 (claim that state regulation is invalid because it conflicts with federal statute was not a civil action seeking redress for the deprivation of "any right, privilege or immunity secured . . . by the Constitution of the United States"); *Golden State*, 493 U.S. at 107-08 (similar).[1]

---

[1] *Swift* was not contrary to how the Court had treated Supremacy Clause actions for 50 years, *see Cal. Pharm.* Resp.

(Continued on following page)

Respondents' contention that they "are seeking to enforce not the Medicaid Act, but the Supremacy Clause," is a fiction that their own briefs cannot sustain. *Compare Santa Rosa* Resp. Br. 49; *Cal. Pharm.* Resp. Br. 41 ("By contrast, the 'essence' of this suit is *not* to enforce Section 30(A), but to enforce the Supremacy Clause.") *with Santa Rosa* Resp. Br. 1 ("claims in this case" seek to enjoin "reductions in Medicaid reimbursement rates that California enacted in violation of Section 30(A) of the Medicaid Act"); *Cal. Pharm.* Resp. Br. 54 (arguing that § 30(A) may be judicially enforced). In Respondents' view, § 30(A) imposes certain requirements to which California failed to adhere when it enacted the statutes challenged in this case. Through their multiple lawsuits, Respondents seek to enforce those requirements against the State – and enjoin state statutes to remedy the State's alleged non-compliance with the federal requirements. Congress, however, intended HHS, not private entities and courts, to be the arbiter of whether the States are complying with § 30(A); Respondents' casting their claims as "constitutional" cannot override that dispositive intent.

3. Respondents contend that administrative enforcement of § 30(A) is inadequate, and that absent injunctions Medicaid recipients would lose access to services. These arguments are neither legally sufficient

---

Br. 32-33, but instead relied on a series of older precedents and overruled a more recent decision, *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962). 382 U.S. at 120-27.

nor factually correct. The Ninth Circuit did not hold that the State violated an "access" standard in § 30(A). Instead, the Ninth Circuit premised its findings of § 30(A) violations on the State's failure to comply with "procedural" requirements of the court's own invention. As discussed in the State's petitions for certiorari, the State introduced hundreds of pages of data, analysis, and sworn declarations to demonstrate that the payments, as reduced, would preserve access while incentivizing the use of more efficient services where available. The Ninth Circuit largely disregarded this evidence as untimely and irrelevant.[2]

Respondents characterize HHS's enforcement powers as "impoten[t]," because, they say, its options are limited to withholding all federal funding if a state is out of compliance with its approved State Plan. *Cal. Pharm.* Resp. Br. 49-50. However, federal law permits HHS to limit its withholding (or disallowance) of federal funds to those parts of the State Plan with which a state is out of compliance. 42 U.S.C. § 1396c; 42 C.F.R. § 430.35(d). Thus, if a state

---

[2] That this Court declined to review the Ninth Circuit's atextual "procedural" approach does not mean that it was correct; the Court may have concluded that the issue may resolve itself in light of new rulemaking promised by the United States. And the federal government has not "found that [California's statutory] reductions violate the Act." *Santa Rosa* Resp. Br. 2. It denied the SPAs because of the length of time that had passed since they were submitted, a decision the State has appealed. Br. for the U.S. as Amicus Curiae 2a-3a, *Douglas v. Indep. Living Ctr. of S. Cal.*, No. 09-958 (Dec. 3, 2010).

chooses to implement a rate reduction that is not approved, the state bears the risk that HHS will withhold federal funds related to the noncompliant rate at issue: a "severe" penalty to be sure, but not the total loss of funding that Respondents describe. *See Cal. Pharm.* Resp. Br. 49; *Santa Rosa* Resp. Br. 40 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-06 (1979)). Moreover, most disputes between states and HHS over compliance with funding conditions are resolved through negotiations and settlements that take into account all relevant interests, federal, state, and private – an essential aspect of administrative enforcement that is lost under Respondents' all-or-nothing injunction approach. *See Cal. Pharm. Ass'n v. Dep't of Health & Human Servs.*, No. C-91-0846-DLJ, 1991 U.S. Dist. LEXIS 13891, at *19-20 (Sept. 13, 1991) ("negotiation" is a part of the "enforcement process in use by [HHS] . . . which [is] used to bring states into compliance without a termination of funds"). Contrary to the impotence label that Respondents attempt to attach to HHS's enforcement powers, the administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring). In any event, any concerns over the adequacy of remedies for federal statutes is a policy determination for Congress to address. *United States v. Locke*, 529 U.S. 89, 117 (2000) ("The issue is not adequate regulation but political responsibility.").

II. PRIVATE PARTIES MAY NOT USE A PREEMPTION THEORY TO ENFORCE § 30(A)

The State's opening brief demonstrated that the Supremacy Clause may supply a rule of decision (i.e., that federal law "trumps" state law when they conflict), but not a cause of action. Pet. Br. 36-40. This Court's preemption cases confirm at most that a federal cause of action may exist where (1) Congress has conferred a federal right; and (2) a party-to-be-regulated seeks to assert federal preemption of state law as a defense to actual or threatened enforcement proceedings (in which case equity may supply the cause of action). Pet. Br. 42-44 & n.14. Even if the Supremacy Clause *could* supply a cause of action where a conflict between federal and state law is alleged, it cannot do so where the only allegation is that a state has failed to satisfy a funding condition, and where such an action would contravene congressional intent. Pet. Br. 46-49.

A. Neither the Supremacy Clause, Nor Equity, Supplies Private Parties with a Cause of Action to Enforce § 30(A)

Respondents now appear to concede that the Supremacy Clause does not create any causes of action, and therefore seek to premise their lawsuits on the federal courts' equity jurisdiction instead.[3] To that

[3] The parties' descriptions of the adoption and operation of the Supremacy Clause are remarkably consistent. *Compare Santa*

(Continued on following page)

end, they assert that equity vindicates the Supremacy Clause by providing a cause of action for injunctive relief when a party has been injured based on a purported conflict between state and federal law.[4] Under their theory, all that a party needs to demonstrate is Article III standing, and congressional intent is irrelevant. Respondents' arguments fail for several reasons.

1. Respondents do not satisfy the criteria for federal equity jurisdiction applied in this Court's preemption cases: existence of a federally conferred *right*, or assertion of federal preemption as a *defense* to purportedly invalid regulation. Respondents contend that the latter "limitation on the authority of the federal courts is not supported by history or precedent." *Dominguez* Resp. Br. 5. However, *both* these criteria were satisfied in *Ex parte Young*, 209 U.S. 123 (1908), and one or both of these criteria were satisfied in virtually all of the sixty-one preemption cases set forth in Respondents' appendix. *See Dominguez* Resp. Br. App.

a. Respondents repeatedly invoke *Young* to support the proposition that a standalone equity cause of

---

Rosa Resp. Br. 13-18 *with* Pet. Br. 36-41. Respondents then argue that "[a] private right of action . . . is necessary to satisfy this constitutional purpose," i.e., that the judiciary rule conflicting state laws "void" (*Santa Rosa* Resp. Br. 14), but this leap in logic is not supported by history or this Court's precedents.

[4] The Ninth Circuit did not limit itself to equitable remedies, however, but awarded retroactive damages when requested to do so. *Indep. Living* Pet. App. 29-37, 46-47.

action exists to vindicate the supremacy of federal law. In *Young*, however, plaintiffs sued to protect infringement of their constitutional "rights," a circumstance not present here. Moreover, *Young* does not represent an unbounded federal equitable power to enjoin state officials, but rather a well-established bill in equity to restrain proceedings at law. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642-44 (2011) (Kennedy, J., concurring); John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008).

A party could obtain an injunction of actual or imminent enforcement proceedings where, *inter alia*, the party had a defense to those proceedings but a legal judgment in defendant's favor would not provide an adequate remedy. 2 John Norton Pomeroy, *A Treatise on Equitable Remedies* § 646 (1905) (*Equitable Remedies*). When the defense was based on the invalidity of state law, a party could demonstrate lack of an adequate legal remedy if it faced a Hobson's choice: either comply with the purportedly invalid law, or else violate that law and be exposed to fines, penalties, or other liability. *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992); *see also Pub. Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943); *Terrace v. Thompson*, 263 U.S. 197, 215-16 (1923); *Young*, 209 U.S. at 163-64. In addition, equitable relief was available in such cases only "to protect *property rights and the rights of persons* against injuries otherwise irremediable." *Terrace*, 263 U.S. at 214 (emphasis added).

Plaintiffs in *Young* satisfied all of these requirements, and their use of the anti-suit injunction is confirmed by Justice Peckham's framing of the issue: whether a party could "obtain freedom from suits, civil or criminal," when faced with impending enforcement of an unconstitutional state law. 209 U.S. at 149. Additionally, the Court found that plaintiffs had no adequate remedy at law, emphasizing the difficulty of finding a railroad employee willing to defy the law as well as the fines the railroad company would incur for violating the act. *Id.* at 163-64. Immediately after *Young* was decided, the case was cited consistently for the limited proposition that "'individuals, who, as officers of the state . . . *threaten and are about to commence proceedings, either of a civil or criminal nature*, to enforce against parties affected [by] an unconstitutional act, . . . may be enjoined by a federal court of equity from such action.'" *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (emphasis added); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 293 (1913); *W. Union Tel. Co. v. Andrews*, 216 U.S. 165, 166 (1910). The present cases, by contrast, do not involve the impairment of personal or property rights, a defense to state regulation, or any "Hobson's choice," and Respondents do not contend otherwise.[5]

---

[5] The well-pleaded complaint rule does not support Respondents' claim that *Young* recognized a "federal cause of action to enjoin state officials who come into conflict with the Constitution or federal laws." *Cal. Pharm.* Resp. Br. 21. Rather, the equity plaintiff's preemptive federal defense satisfied the well-pleaded complaint rule because a bill in equity had to "tell the entire

(Continued on following page)

Respondents' reliance on *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824), which they characterize as a precursor to *Young*, is similarly misplaced. *See Cal. Pharm.* Resp. Br. 20-21. *Osborn* and *Young* did not represent the same cause of action. Instead, as the Court explained in *Young*, *Osborn* was a suit to enjoin "trespass upon . . . tangible property," whereas *Young* was "a bill filed to prevent the commencement of suits." 209 U.S. at 167. Moreover, plaintiffs in *Osborn* asserted infringement of federally protected "rights and privileges," and Congress had expressly authorized suit in federal court. 22 U.S. at 825, 839. Far from supporting Respondents' position, *Osborn* demonstrates no more than that federal equity jurisdiction may be available when a party's claims fit within a pre-existing cause of action, involve infringement of federal rights, and do not conflict with congressional intent – none of which can be said about the present actions.

b. The sixty-one preemption cases cited by Respondents confirm, rather than undercut, the limitations on federal equity jurisdiction. *See Dominguez* Resp. Br. App. In forty-seven of the sixty-one cases, plaintiffs asserted federal preemption as an anticipatory *defense* to state enforcement of purportedly invalid state regulation of their conduct. *See Dominguez*

---

story" of why the defendant's action was unlawful. Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1129 (1969); *see also* 1 Roger Foster, *A Treatise on Federal Practice in Civil Cases* § 67 (1892).

Resp. Br. App. (Nos. 1-4, 6, 8-11, 13, 15-16, 18, 20-34, 35-43, 46-54, 57).[6] In addition, federal "rights" may have been lurking in a number of these cases.[7] And sixteen of these forty-seven cases involved express pre-emption clauses, a type of federal statute from which

---

[6] *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), is included because preemption was raised defensively by a county in a state court lawsuit brought by a school district to enforce a state statute.

[7] *See, e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007) ("We have 'interpret[ed] grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.' "); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584 (1987) (" 'rights granted by the Mining Law of 1872' "); *Lawrence*, 469 U.S. at 258 (federal statute authorized a local unit to "use the payment for any governmental purpose"); *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) ("[S]tate law which interferes with the exercise of these federally protected rights . . . is pre-empted."); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."); *Malone v. White Motor Corp.*, 435 U.S. 497, 502 (1978) (claim that state law " 'interferes with the right of Plaintiffs to free collective bargaining under federal law' "); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 281 (1977) (federal license "transfer[s] to the licensee 'all the right' which Congress has the power to convey"); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) ("[T]his legislation deals with the rights, liberties, and personal freedoms of human beings. . . ."); *Cummings v. City of Chicago*, 188 U.S. 410, 411-12 (1903) ("The controlling question . . . is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War . . . to proceed with the proposed work. . . ."); *see also N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519 (1979) (asserting *Machinists*-type preemption claim); *Golden State*, 493 U.S. 103.

it may be possible to infer congressional intent to permit a private right of action. *Dominguez* Resp. Br. App. (Nos. 1, 3, 4, 6, 8, 9, 11, 15, 16, 18, 20, 22, 23, 26, 32, 40).

Of the cases that remain, five involved challenges to state or local taxation of a federal instrumentality, or of land that retained a federal interest or character. *Dominguez* Resp. Br. App. (Nos. 55, 56, 58, 59, 61). These cases, too, do not support Respondents. At the time these cases were filed, this Court had recognized, though carefully circumscribed, the circumstances in which a bill in equity could be brought to enjoin illegal state tax collection. *See Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282-83, 285 (1909). Based on this well-established authority, state officials did not dispute federal equity jurisdiction in such cases. *See Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292, 296 (1914). Respondents, by contrast, are not seeking to enjoin collection of an illegal tax.[8]

That this Court assumed the existence of a cause of action in the few remaining cases does not mean that there was one. *See Sandoval*, 532 U.S. at 287 (describing "*ancien régime*," in which "rights" were not

---

[8] In addition, the parties in such suits appear to have been asserting federally protected rights not to be subject to state taxation. *Osborn*, 22 U.S. at 838; *see also Boise*, 213 U.S. at 282 (an equity court will not interfere with state taxing efforts "in . . . cases where the Federal rights of the persons could otherwise be preserved unimpaired" through, *inter alia*, remedies at law).

analyzed with the same rigor). That said, a number of the remaining cases appear to have involved individualized, if unexamined, federal rights upon which the state purportedly was infringing.[9] *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), on which Respondents heavily rely, arose in the highly specialized context of foreign relations. *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). Had the issue been raised, the Court might have inferred the requisite intent to permit private enforcement based on this unique context, or held that no private action existed. Preemption in *Foster v. Love*, 522 U.S. 67 (1997), upon which Respondents also heavily rely, was premised on congressional action pursuant to the Elections Clause; again,

---

[9] *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), was expressly brought under § 1983, and 42 U.S.C. § 503(a)(1) has been held to be privately enforceable. *See* Br. of the Appellants, S. Ct. No. 70-507, 1970 WL 136861, at *1-2 (Dec. 2, 1970); *Zambrano v. Reinert*, 291 F.3d 964 (7th Cir. 2002). Plaintiffs in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), sought to enforce 42 U.S.C. § 1396p, which prohibits states from imposing a lien "against the property of any individual prior to his death." While *Rosado v. Wyman*, 397 U.S. 397 (1970), did not address plaintiffs' cause of action, the Court clearly assumed plaintiffs had a right to enforce the federal statutory provisions at issue. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *id.* at 30 (Powell, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 676 (1974); *id.* at 690 (Marshall, J., dissenting). One additional case involves the NLRA, a federal statute conferring rights enforceable under 42 U.S.C. § 1983. *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218 (1993); *Golden State*, 493 U.S. 103.

had the issue been raised, the Court might have inferred the requisite intent from this specialized context, *see Gonzalez v. Arizona*, 624 F.3d 1162, 1174 (9th Cir. 2010), or simply held that plaintiff voters lacked a private cause of action. *Cf. Lance v. Coffman*, 549 U.S. 437 (2007) (Colorado voters lacked standing to challenge provision of Colorado Constitution as violating the Elections Clause).[10]

Finally, in the sixty-one cases, preemption actions were brought in service of congressional intent, most frequently to prevent state regulatory action from undermining the uniformity of a federal regulatory scheme. *See, e.g., Ray v. Atl. Richfield Co.*, 435 U.S. 151, 165 (1978) ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."); *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625 (1973); *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961). By contrast, Respondents' effort to maintain a private cause of action is *contrary* to congressional intent, and would lead to *disunity* rather than uniformity in the interpretation of

---

[10] *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 719-21 (1865), cited by Respondents, did not involve a federal claim per se, as federal jurisdiction was based on diversity of citizenship, and plaintiff was asserting, *inter alia*, a nuisance claim, in addition to infringement of unspecified "rights." In *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996) (per curiam), the Court only granted certiorari on the scope of the injunctions; it did not address the underlying claim of preemption.

federal law. Perhaps more striking is that, in some of these cases, state efforts to supplement remedies provided by Congress were held preempted because Congress intended for centralized administrative enforcement. *See, e.g., Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 289-90 (1986) ("The NLRA, in contrast, was designed in large part to 'entrus[t] administration of the labor policy for the Nation to a centralized administrative agency.'"); *see also N.Y. Tel. Co.*, 440 U.S. at 528. Respondents invoke preemption here to achieve *exactly the opposite* result – to *compel* a supplemental remedy *in contravention* of congressional intent for centralized administrative enforcement.

c. Respondents resort, finally, to general equitable principles in an effort to find a vehicle for their lawsuits, claiming that equity courts would grant relief to "anyone harmed" so long as the case "otherwise fell within the federal courts' jurisdiction." *Cal. Pharm.* Resp. Br. 27; *Dominguez* Resp. Br. 11. Their theory, thus, contains no limiting principles whatsoever, beyond Article III standing. Even were Respondents correct as a historical matter, the availability of equitable relief to enforce federal statutes has long been circumscribed by such concerns as separation-of-powers, respect for state sovereignty, and fidelity to congressional intent. *See, e.g., Sandoval*, 532 U.S. 275; *Blessing v. Freestone*, 520 U.S. 329 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1; *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (the "contractual

nature" of Spending Clause laws "has implications for our construction of the scope of available remedies"). Private parties in *Sandoval*, *Blessing*, *Seminole*, and *Pennhurst* all claimed injury and sought equitable relief, and in all these cases that relief was denied.[11]

Respondents' conception of equity jurisdiction is, in any event, ahistorical. Equity courts were not "roving commission[s] to do justice beyond the law," but provided relief through established forms of proceeding. Philip Hamburger, *Law and Judicial Duty* 338-39 (2008); *see also Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 784-92 (2004). A claim had to fit with certain remedies-based causes of action, such as a bill to restrain proceedings at law or a bill to restrain the assessment of taxes. *Bellia*, *supra*, at 784-86; *see also* 1 Foster, *supra*, § 210 (describing circumstances in which an injunction may issue). Respondents' claims fit into neither the bill to restrain proceedings at law nor any of the remedies-based causes of action in the federal equity cases they cite. *See Dominguez* Resp. Br. 7-10, 17, 39-40 (citing, among others, cases filed

---

[11] If it was true that the only requirement for a federal action "to bring a government official into compliance with federal law" was standing, *see Cal. Pharm.* Resp. Br. 20, many of the Court's decisions on whether a federal statute could be privately enforced under § 1983 were mere sport. In many of these cases, private parties sought injunctive relief, and it could have been ordered under Respondents' theory without resort to § 1983. *See* Amicus Br. of the U.S. 26-27.

under bills to restrain nuisance, to enjoin the collection of taxes, to enjoin trespass, and to restrain proceedings at law).

Respondents thus urge precisely the vision of equity practice that early commentators and this Court have warned against. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19 (14th ed. 1918) ("If indeed a Court of Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it . . . it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (court of equity may not "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"). It was a maxim of equity that "[e]quity follows the law." 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 425 (3d ed. 1905) (*Equity Jurisprudence*). A court of equity could not "create a remedy in violation of law, or even without the authority of law." *Rees*, 86 U.S. at 122. Thus, "where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper" for a court of equity to "take it up where the law leaves it, and to extend it further than the law allows." 1 Pomeroy, *Equity Jurisprudence*, *supra*, § 425; *see also I.N.S. v. Pangilinan*, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'"); *Rees*, 86 U.S. at 122.

Here, the administrative remedy provided by Congress, "bounded and circumscribed by particular rules," may not be extended in the absence of congressional intent.

Finally, Respondents cannot allege the impairment of right or title that is required for equitable relief against a state actor, such as a right to real and personal property, rights in person, and statutory rights. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); *Terrace*, 263 U.S. at 214; 1 Pomeroy, *Equitable Remedies*, *supra*, § 323. Plaintiffs in the cases cited by Respondents satisfied this requirement.[12] Respondents do not – indeed, the very premise of these cases is that they lack any rights under the Spending Clause provision at issue.

d. In light of these precedents, Respondents now claim that the present cases involve a defense to state regulation of their primary conduct. *Santa Rosa* Resp. Br. 34-35; *Cal. Pharm.* Resp. Br. 27. They cite California Welfare and Institutions Code § 14019.4, a state law that prohibits them from seeking reimbursement directly from Medicaid beneficiaries. However, the present lawsuits challenge the State's rate reductions,

---

[12] *See, e.g., Scott v. Donald*, 165 U.S. 107 (1897) (bill to enjoin state confiscation of plaintiff's liquor); *Pennoyer v. McConnaughy*, 140 U.S. 1, 25 (1891) (bill to enjoin defendants from selling and conveying land to which plaintiff asserted title); *Poindexter v. Greenhow*, 114 U.S. 270, 283 (1885) (action of detinue against a tax collector for return of personal property); *Hughes v. Trustees of Morden Coll.*, 27 Eng. Rep. 973 (Ch. 1748) (bill to enjoin trespass on land in plaintiff's possession).

not the State's enforcement of § 14019.4. Further, Respondents have never claimed, and have therefore waived any argument, that § 14019.4 conflicts with federal law.

2. Respondents contend that they may assert a standalone cause of action to vindicate the proper "structural" relationship between the federal and state governments, but the cases upon which they rely do not support their theory. In *Bond v. United States*, 131 S. Ct. 2355 (2011), and related cases, private parties raised federal constitutional provisions as a *defense* to actual or anticipated enforcement of a state or federal statute that otherwise would have regulated plaintiff's conduct and subjected plaintiff to penalties. Thus, while this Court permitted a criminal defendant in *Bond* to raise the Tenth Amendment as a defense to enforcement of a federal criminal statute against her, this Court has refused to allow private parties to sue under the Tenth Amendment where the defensive component was lacking. *Tenn. Elec.*, 306 U.S. at 144. Indeed, in *Bond*, this Court explained that the power companies in *Tennessee Electric* lacked a cause of action to challenge the competitive operations of the TVA precisely because the state had not sought to *regulate* plaintiffs (and penalize any noncompliance), but merely to *compete* with them. 131 S. Ct. at 2362. Similarly, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), in which an investigated entity sought to challenge the creation of a federal oversight board on separation-of-powers grounds, the Court expressly acknowledged

the defensive posture of the case, explaining that "[w]e normally do not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'" 130 S. Ct. at 3151.[13]

Respondents also cite, in support of their "structural" cause-of-action theory, dissenting opinions in *Dennis v. Higgins* and *Golden State*. Again, however, these dissents discussed the *defensive* use of Constitution-derived "structural" immunities to invalid state regulation. *See, e.g.*, *Dennis*, 498 U.S. at 451-65 (Kennedy, J., dissenting); *Golden State*, 493 U.S. at 113-19 (Kennedy, J., dissenting). While the *Golden State* dissent discussed the existence of this type of immunity, it did not address the circumstances under which it could be asserted. In *Dennis*, however, Justice Kennedy clarified that he had a defensive suit in mind when he wrote the *Golden State* dissent. 498 U.S. at 462-63 (Kennedy, J., dissenting) (under the reasoning of the *Golden State* dissent, the party in *Higgins* could have "rel[ied] on the unconstitutionality [under the Commerce Clause] of the tax in defending a collection action brought by the State"). More recent opinions have further emphasized the defensive nature of such suits against the States.

---

[13] *Free Enterprise Fund* did not "expressly uph[o]ld 'an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.'" *Santa Rosa* Resp. Br. at 25 (quoting 130 S. Ct. at 3151 n.2 (quoting Brief for the United States 22)). The quote-within-a-quote was a party's characterization of the issues, not the Court's holding.

Va. Office for Prot. & Advocacy, 131 S. Ct. at 1642 (Kennedy, J., concurring) ("That negative injunction [in *Ex parte Young*] was nothing more than the preemptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *see also id.* at 1643 ("*Verizon Md.* itself was an easy case, for it involved the same kind of preenforcement assertion of a defense that was at issue in *Young*.").

In any event, the present cases do not involve purported "structural" violations. By their nature, "structural" violations involve state "encroachment on Federal powers," and the remedy when such encroachment occurs is to declare such state action "void." *See Higgins*, 498 U.S. at 443 n.4 (quoting Rep. Shellabarger, Cong. Globe, 42nd Cong., 1st Sess., App. 69-70 (1871)). Here, the challenged state reductions do not "encroach" on any federal power, but at most amount to a purported failure to satisfy a federal funding condition. *See* Part II.B, *infra*.

3. Respondents also cite, as authority to enjoin state officials who are purportedly acting in excess of their authority, cases challenging *federal* government action under the "non-statutory review" doctrine. *Cal. Pharm.* Resp. Br. 23-25. Cases against federal officials, however, do not implicate the same federalism concerns that govern lawsuits against a *state* in a *Spending Clause* context – concerns that lie at the heart of the limitations on such suits recognized in *Gonzaga* and *Pennhurst*. Moreover, these claims, too, are subject to the requirements that apply to other

equitable causes of action, including, *inter alia*, irreparable injury to personal property, rights to real and personal property, rights in person, and statutory rights. *See, e.g., Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (Postmaster General's withholding of mail "violate[d] the property rights of the person whose letters are withheld"); *Harmon v. Brucker*, 355 U.S. 579, 582 (1958) (per curiam) ("[T]he claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries.").[14] Respondents have asserted no such legally cognizable right or interest. Part II.A.1.c, *supra*. And, in both *McAnnulty* and *Harmon*, the administrative review process had been completed, which enabled the Court to conclude there were no other means to redress plaintiffs' injuries. *Harmon*, 355 U.S. at 580; *McAnnulty*, 187 U.S. at 122. Here, by contrast, the administrative review process remains pending and, were HHS to rule against the State, it could order the State to provide additional retroactive funding to avoid forfeiting federal funds.[15]

---

[14] *Dalton v. Specter*, 511 U.S. 462, 474 (1994), also cited by Respondents, did not hold that plaintiffs had a cause of action, but merely "assume[d so] for the sake for argument," a point that Respondents' truncated quotation obscures. *Compare Cal. Pharm.* Resp. Br. 24 *with* 511 U.S. at 474.

[15] That the State, in such a circumstance, would have the *option* of choosing *not* to make additional payments, and thereby forfeit federal funds, is an essential feature of Spending Clause legislation. Thus, the State's possible selection of that option

(Continued on following page)

4. Respondents suggest that their inability to satisfy the criteria guiding when federal equity courts would hear preemption claims goes to the merits of a cause of action rather than its existence. *Santa Rosa* Resp. Br. 35; *Dominguez* Resp. Br. 48 n.24. However, the "concept of a 'cause of action' is employed specifically to determine who may judicially enforce . . . statutory rights or obligations." *Davis*, 442 U.S. at 239; *see also id.* ("If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action.'"). Because Congress has not included Respondents among those who may enforce obligations owed by the State to the federal government under § 30(A), they lack a cause of action.

B. Preemption Is Not Available to Enforce § 30(A), a Funding Condition, in Contravention of Congressional Intent

Even if private parties could bring standalone preemption claims to enforce federal statutes in appropriate cases, private preemption claims would not be available to Respondents to enforce § 30(A). This is because (1) Respondents' cases lack the "repugnancy" element so critical to the Supremacy Clause; and (2) preemption claims may not be recognized in contravention of congressional intent regarding how federal statutes are to be enforced.

---

would not render an administrative remedy "inadequate" to justify the exercise of equity jurisdiction.

1. Respondents cannot satisfy the predicate for the type of suit they claim exists: a conflict between state and federal law. A state may fail to satisfy a Medicaid funding requirement, *but still be in compliance with federal law*. Section 30(A) imposes a condition for receipt of federal funds, while *other* federal laws direct what happens when a state fails to satisfy a funding condition. *See, e.g.*, 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.33, 430.35, 430.38, 430.42, 430.48. Although it is alleged that California has breached a funding condition, it is not alleged that California has violated any law governing the consequences for that breach, nor could Respondents assert such a claim; such a claim would be unripe (even assuming Respondents had standing to assert it), as the administrative process is still pending with respect to the reductions at issue. In short, an alleged breach of a funding condition, by itself, does not supply the type of conflict between federal and state laws that implicates the Supremacy Clause. Rather, as demonstrated in Petitioners' opening brief, the remedies for any breach are governed by the contractual relationship between the State and Federal governments, as set forth in statutes, regulations, and state plans. Pet. Br. 46-49.

And while Respondents are no doubt correct that it is wrong "to imply that *all* contract-law rules apply to Spending Clause legislation," *Barnes v. Gorman*, 536 U.S. 181, 186 (2002), this Court in *Barnes* also noted that it has "repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a

contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'" *Id.* Among those conditions are the sanctions for noncompliance. Respondents' insistence that "the Supremacy Clause applies to *all* 'Laws of the United States,'" including Spending Clause enactments, is a non sequitur. *Dominguez* Rep. Br. 22. Here, that law provides that "State plans that do not meet [§ 30(A)'s] requirements are to be defunded by the Secretary – they are not void under the Supremacy Clause." *PhRMA v. Walsh*, 538 U.S. 644, 680 n.3 (2003) (Thomas, J., concurring in judgment). To be sure, as Respondents observe, this Court has sometimes described state laws that breached Spending Clause conditions as being "pre-empted." That may have served as a convenient, albeit inaccurate, shorthand. Chief Justice Burger was correct when he stated that "adherence to the provisions of [a Spending Clause provision] is in no way mandatory upon the States under the Supremacy Clause. The appropriate inquiry . . . should be simply whether the State has indeed adhered to the provisions and is accordingly entitled to utilize federal funds in support of its program." *Townsend v. Swank*, 404 U.S. 282, 292 (1971) (Burger, C.J., concurring in the result).

This does not mean that *all* provisions of the Medicaid Act (or other Spending Clause statutes) are unenforceable by private parties. Numerous provisions of the Medicaid Act have been held to "clearly" and "unambiguously" confer "rights" on private parties that are judicially enforceable. Pet. Br. 46 n.17. Such

lawsuits are not premised on abstract concerns about federal-state conflicts or federal-state structural relationships, but rather on the actual deprivation of concrete federal "rights." When created by Congress, such rights become a part of a state's quasicontractual relationship with the federal government. While private parties may sue to protect such "rights," that is not the type of lawsuit at issue here.

2. Further, private preemption claims are not available *in spite* of Congress's intent regarding how federal statutes are to be enforced, but only *in service* of that intent. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion) ("[I]t is Congress rather than the courts that preempts state law."); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) ("'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'"); *see, e.g.*, *Gould*, 475 U.S. at 289-90 (preempting supplemental state law remedy as inconsistent with administrative enforcement of federal statute). As the United States explains, Amicus Br. of the U.S. 31-32, Congress has put HHS, not private parties, in charge of holding states to their obligations to balance the policy objectives in § 30(A) when setting rates, a legislative delegation that the courts must respect.

Respondents mine the legislative history of § 30(A) and other provisions of the Medicaid Act for expressions of congressional intent to provide for private enforcement. Their effort fails on multiple levels. First, it cannot be reconciled with their longstanding concession that, as the Ninth Circuit held in *Sanchez*

v. Johnson, § 30(A) does not create any privately enforceable rights. It is far too late in the day for Respondents to call into question the very predicate of the issue now before this Court. Second, even if they existed, expressions of intent buried deep in the legislative history could not supply the "clear" and "unambiguous" intent to confer a privately enforceable "right" required for private enforcement of federal funding conditions. *See Gonzaga*, 536 U.S. at 280; *supra*, Part I.

Third, and in any event, no such evidence of intent resides in the legislative history of § 30(A). Respondents and their amici quote extensively from a committee report prepared in connection with the Omnibus Reconciliation Act of 1981, but the language on which they rely appears in a section of the report describing amendments to Medicaid's "freedom-of-choice" provision, 42 U.S.C. § 1396a(a)(23), *not § 30(A)*, and specifically refers to the "rights of Medicaid beneficiaries or participating providers." *Cal. Pharm.* Resp. Br. 54-55 (citing H.R. Rep. No. 97-158, Vol. II, at 301 (1981)); *Indep. Living* Resp. Br. 20-21, 54-55; Amicus Br. of Former HHS Officials 15; Amicus Br. of AMA 13. Unlike § 30(A), the freedom-of-choice requirement (giving Medicaid recipients the power to choose their doctors) has been held to confer private, judicially enforceable, rights on beneficiaries. *See, e.g., Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

Respondents also note that Congress amended § 30(A) in 1989 to supplement the factors that states must balance as part of their ratemaking. *Cal. Pharm.*

Resp. Br. 55. However, they did not contend below, and do not now contend, that the 1989 amendment conferred any "rights" or otherwise evinced congressional intent that it be judicially enforced by private parties.[16] Seven members of Congress urge that "Congress has expressly chosen to maintain § 30A knowing full well that it provides enforceable rights." Amicus Br. of Members of Congress 5. However, Congress's failure to enact a legislative "fix" to the host of circuit decisions holding that § 30A does *not* confer rights suggests otherwise.

Respondents also cite a committee report demonstrating Congress's intention to preserve providers' right to sue for injunctive relief under the Boren Amendment following repeal of that statute's Eleventh Amendment waiver requirement. *Cal. Pharm.* Resp. Br. 51-52; *see* S. Rep. 94-1240, at 4 (1976). Preservation of some form of private enforcement of Boren following the waiver repeal made sense, given that, unlike § 30(A), Congress "*designed [Boren] to afford providers access to a judicial remedy for purposes of enforcing their legal rights.*" S. Rep. No. 94-1240, *supra*, at 3 (emphasis added). Significantly, no such similar expressions of legislative intent exist with respect to § 30(A) regarding either "legal rights" or their enforcement. To the contrary, substantial differences

---

[16] Contrary to Respondents' assertions, the State does not concede that this language did more than add a new objective to those that States must balance in establishing rates. *See Cal. Pharm.* Resp. Br. 56.

in the text and structure of Boren and § 30(A) suggest that Congress had entirely different intentions with respect to how the two provisions would be enforced, and by whom. Boren required states to set payments at a level that was "reasonable and adequate" to "meet the costs" of efficiently and economically operated providers, and to "find[ ] and make[ ] assurances satisfactory to the Secretary" that the standard was satisfied. *Wilder*, 496 U.S. at 503. By contrast, § 30(A) does not set an objective, judicially enforceable standard for the States' Medicaid ratemaking, nor does it make state findings – and HHS approval of those findings – a precondition to valid rates.[17] Finally, that Congress did not require the States to waive their Eleventh Amendment immunity to claims under § 30(A), as it previously did for Boren, and has done in connection with other federal statutes, *see, e.g.*, 20 U.S.C. § 1403(a)-(b), is consistent with the absence of any privately enforceable rights, and therefore supports Petitioners, not Respondents.

Congressional enactments in the wake of *Suter v. Artist M.*, 503 U.S. 347 (1992), to confirm the private

---

[17] Boren's express requirement of HHS approval of a state's findings may explain why some courts interpreted Boren as requiring states to obtain SPA approval prior to changing their rates. *See, e.g., Exeter Mem. Hosp. Ass'n v. Belshe*, 145 F.3d 1106 (9th Cir. 1998). No statute or regulation currently in effect imposes such a requirement on the States, let alone confers on providers or beneficiaries a right to judicially enforce it. *See* Supplemental Brief of Petitioners, *Douglas v. Cal. Pharm. Ass'n*, S. Ct. No. 09-1158 (Dec. 20, 2010).

enforceability of *some* state plan components, do not reflect congressional intent that *all* provisions of such plans, or of the Social Security Act generally, be privately enforceable. *See Cal. Pharm.* Resp. Br. 53; *Dominguez* Resp. Br. 25-26. Even as Congress enacted the *Suter* fix, it directed that this legislation not be otherwise construed "to limit *or expand* the grounds for determining the availability of private actions," and confirmed that the statute at issue in *Suter* was not privately enforceable. 42 U.S.C. §§ 1320a-2, 1320a-10 (emphasis added); *see also* Amicus Br. for the U.S. 30-31.

Respondents' remaining arguments regarding congressional intent take aim at straw men. Petitioners do not contend that *all* funding conditions in Spending Clause statutes are off-limits to private enforcement, *Santa Rosa* Resp. Br. 36, nor do they contend that Congress has entirely displaced private enforcement of the Medicaid Act. *See Cal. Pharm.* Resp. Br. 46. Rather, Petitioners argue only that private enforcement is limited to those provisions of the Medicaid Act that reflect congressional intent to confer a "right" and a remedy (which § 1983 may supply). That Congress once considered but failed to enact legislation that would have eliminated *all* private Medicaid suits, *Cal. Pharm.* Resp. Br. 58-59, is thus of no moment.

C. Prudential Standing Principles Bar Respondents' Claims

Three different strands of prudential-standing analysis also bar Respondents' claims. Pet. Br. 49-52.

These arguments have been properly preserved for review by this Court.

While it is true that every strand of prudential-standing analysis was not preserved in *every* one of the underlying seven appeals, it is also true that two of the strands (no-third-party-assertion-of-rights and zone-of-interest) were preserved in *at least one or more* of the underlying appeals. *See* Pet. Br. 50 n.19. The third strand, barring "generalized" grievances, was suggested by the Ninth Circuit's analysis rather than by Respondents' pleadings. These prudential standing arguments are "fairly included" in the question presented: "Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 30(A)." S. Ct. Rule 14.1(a).

Turning to the merits: In arguing that Medicaid providers are within the "zone of interest" protected by § 30(A), Respondents conflate the zone-of-interest test that applies under the "generous review provisions" of the Administrative Procedure Act ("APA") with the more rigorous zone-of-interest test that applies outside of that context. *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987). Because this is not an APA case, providers must demonstrate that Congress enacted § 30(A) for their "*especial* benefit." *Clarke*, 479 U.S. at 399-400 n.16. This they cannot do.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Dated: September 1, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
RICHARD T. WALDOW
KARIN S. SCHWARTZ*
SUSAN M. CARSON
JENNIFER M. KIM
Supervising Deputy Attorneys General
GREGORY D. BROWN
CARMEN SNUGGS
Deputy Attorneys General

**Counsel of Record*
Counsel for Petitioners

Of counsel:
DAN SCHWEITZER
2030 M Street, NW, 8th Floor
Washington, DC 20036-3306
(202) 326-6010

Nos. 09-958, 09-1158 and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER

v.

INDEPENDENT LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., ET AL.

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER

v.

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

LEONDRA R. KRUGER
Acting Deputy Solicitor General

(Additional Counsel Listed on Inside Cover)

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
MARK B. STERN
DANIEL J. LENERZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under 42 U.S.C. 1396a(a)(30)(A), a State's plan for medical assistance under the Medicaid Act must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary * * * to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." The question presented is as follows:

Whether Medicaid providers and beneficiaries may maintain a cause of action under the Supremacy Clause to enforce Section 1396a(a)(30)(A) by asserting that the provision preempts state law reducing reimbursement rates.

TABLE OF CONTENTS

Page

Interest of the United States 2
Statement 2
Summary of argument 9
Argument:
Medicaid providers and beneficiaries cannot maintain a cause of action for equitable relief to enforce 42 U.S.C. 1396a(a)(30)(A) against state officials 11
A. No federal statute provides a private cause of action to enforce 42 U.S.C. 1396a(a)(30)(A) against state officials 12
B. This Court has never squarely decided if or when a nonstatutory cause of action for equitable relief on preemption grounds should be recognized under the Supremacy Clause or otherwise 16
C. The creation of a nonstatutory private cause of action for equitable relief to enforce 42 U.S.C. 1396a(a)(30)(A) against state officials would not be compatible with the nature of the statutory scheme 24
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985) 2
Alexander v. *Sandoval*, 532 U.S. 275 (2001) 20, 26, 27
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 18
Arkansas Dep't of Health & Human Servs. v. *Ahlborn*, 547 U.S. 268 (2006) 18

Cases—Continued: Page

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 27

Astra USA, Inc. v. *Santa Clara County*, 131 S. Ct. 1342 (2011) 25

Atkins v. *Rivera*, 477 U.S. 154 (1986) 2

Bennett v. *Arkansas*, 485 U.S. 395 (1988) 27

Bennett v. *Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) 27

Blessing v. *Freestone*, 520 U.S. 329 (1997) 12, 15, 26

Burks v. *Lasker*, 441 U.S. 471 (1979) 24

Bush v. *Lucas*, 462 U.S. 367 (1983) 20

Chapman v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979) 20

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 23

Dominguez v. *Schwarzenegger*, 270 F.R.D. 477 (N.D. Cal. 2010) 7

Edelman v. *Jordan*, 415 U.S. 651 (1974) 27, 29

Equal Access for El Paso, Inc. v. *Hawkins*, 509 F.3d 697 (5th Cir. 2007), cert. denied, 129 S. Ct. 34 (2008) 13

Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 21

German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U.S. 220 (1912) 28

Golden State Transit Corp. v. *City of L.A.*, 493 U.S. 103 (1989) 18, 19, 20, 21

Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 9, 13, 14, 16, 32

Cases—Continued: Page

Long Term Care Pharmacy Alliance v. *Ferguson*, 362 F.3d 50 (1st Cir. 2004) 13, 15

Maine v. *Thiboutot*, 448 U.S. 1 (1980) 16, 28, 29

Mandy R. v. *Owens*, 464 F.3d 1139 (10th Cir. 2006), cert. denied, 549 U.S. 1905 (2007) 13

New York Ass'n of Homes & Servs. for the Aging v. *DeBuono*, 444 F.3d 147 (2d Cir. 2006) 13

New York State Dep't of Social Servs. v. *Dublino*, 413 U.S. 405 (1973) 22

Pediatric Specialty Care, Inc. v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), cert. granted, judgment vacated in part, 551 U.S. 1142 (2007) 13

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 27

Philpott v. *Essex County Welfare Bd.*, 409 U.S. 413 (1973) 27

PhRMA v. *Concannon*, 249 F.3d 66 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003) 23

PhRMA v. *Walsh*, 538 U.S. 644 (2003) 18, 23

Quern v. *Jordan*, 440 U.S. 332 (1979) 27

Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 18

Sanchez v. *Johnson*, 416 F.3d 1051 (9th Cir. 2005) 13, 14, 15, 31, 32

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 32

Shaw v. *Delta Air Lines*, 463 U.S. 85 (1983) 17

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 17, 24

Cases—Continued: Page

Suter v. *Artist M.*, 503 U.S. 347 (1992) 16, 26, 32
Swift & Co. v. *Wickham*, 382 U.S. 111 (1965) 20
Tenet v. *Doe*, 544 U.S. 1 (2005) 26
Verizon Md. Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 17, 20, 32
Virginia Office for Prot. & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 19, 20, 32
Watters v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) 18
Westside Mothers v. *Olszewski*, 454 F.3d 532 (6th Cir. 2006) 13
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963) 21
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 2, 14, 27
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 27
Young, Ex parte, 209 U.S. 123 (1908) 19

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 10, 17, 22, 25, 27, 29
Art. VI, Cl. 2 (Supremacy Clause) ..... *passim*
Amend. XI 19
Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 507 14
Medicaid Act, 42 U.S.C. 1396 *et seq.*:
42 U.S.C. 1396a(a) 2, 31
42 U.S.C. 1396a(a)(13)(A) (1988) 14
42 U.S.C. 1396a(a)(13)(A) 14

Statutes, regulations and rule—Continued: Page

42 U.S.C. 1396a(a)(30)(A) ..... *passim*
42 U.S.C. 1396a(b) 3
42 U.S.C. 1396c 3
Social Security Act, 42 U.S.C. 301 *et seq.*:
42 U.S.C. 1316(a)(1) 3
42 U.S.C. 1316(a)(2)-(5) 3
42 U.S.C. 1316(b) 3
42 U.S.C. 1320a-2 30
42 U.S.C. 1320a-10 30
42 U.S.C. 1396 *et seq.* (Tit. XIX) 2
28 U.S.C. 1331 18
28 U.S.C. 2201 18
28 U.S.C. 2202 18
28 U.S.C. 2281 (1964) 20
42 U.S.C. 1983 ..... *passim*
Cal. Welf. & Inst. Code § 12306.1(d)(6)-(7) (West Supp. 2011) 4
42 C.F.R:
Section 430.10 2
Section 430.10 *et seq.* 3
Section 430.18 3
Section 430.35 3
Section 430.38 3
Section 430.60 *et seq.* 3
Fed. R. Civ. P. 52(a)(6) 32

Miscellaneous:

1 C.L. Bates, *Federal Equity Procedure* (1901) 20

Miscellaneous—Continued: Page

76 Fed. Reg. (2011):
p. 26,342 12
p. 26,344 15
p. 26,349 16
H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. (1994) ... 30
John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989 (2008) 19
9 John E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007) 28
4 John Norton Pomeroy, Jr., *Equity Jurisprudence* (4th ed. 1919) 19
Restatement (Second) of Contracts (1981) 28

In the Supreme Court of the United States

No. 09-958

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
INDEPENDENT LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., ET AL.

No. 09-1158

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

No. 10-283

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

These cases concern whether Medicaid providers and beneficiaries can assert a federal cause of action directly under the Supremacy Clause to enjoin state Medicaid reimbursement rates as inconsistent with Section 1396a(a)(30)(A) of the Medicaid Act. At the Court's invitation, the Acting Solicitor General filed an amicus brief on behalf of the United States at the petition stage in No. 09-958.

STATEMENT

1. The Medicaid program, established in 1965 by Title XIX of the Social Security Act (SSA), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). State participation in Medicaid is voluntary, but those States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in her administration of the Act. *Wilder*, 496 U.S. at 502; *Rivera*, 477 U.S. at 157. Within those limits, however, each State enjoys great flexibility in both designing and administering its own program. *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985).

To qualify for federal funds, participating States must submit to the Secretary, and receive approval of, a "plan for medical assistance" detailing the nature and scope of the State's Medicaid program. 42 U.S.C. 1396a(a); 42 C.F.R. 430.10; *Wilder*, 496 U.S. at 502. Among other requirements, a State's plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary

> to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. 1396a(a)(30)(A). The Secretary reviews the State's plan (and any amendments thereto) and determines whether it complies with the statutory and regulatory requirements. 42 U.S.C. 1316(a)(1) and (b), 1396a(b); 42 C.F.R. 430.10 *et seq.* If the Secretary disapproves the plan, the State can seek reconsideration and, ultimately, judicial review in the court of appeals. See 42 U.S.C. 1316(a)(2)-(5) and (b); 42 C.F.R. 430.18, 430.38, 430.60 *et seq.* If the State does not act in compliance with an approved plan, the Secretary may initiate a compliance action and withhold federal funds. See 42 U.S.C. 1396c; 42 C.F.R. 430.35.

2. The consolidated cases challenge several reductions in Medicaid payment rates previously adopted by the California Legislature:

Assembly Bill 5 (AB 5) (09-1158 Pet. App. 190-197): On February 16, 2008, the California Legislature passed AB 5, which reduced by ten percent payments under California's Medicaid program (Medi-Cal) to physicians, dentists, pharmacies, adult day health centers (ADHCs), clinics, health systems, and other providers, and similarly reduced payments for inpatient services provided by acute care hospitals not under contract with the State (non-contract hospitals). The reductions were scheduled to take effect on July 1, 2008. 09-958 Pet. App. 4.

Assembly Bill 1183 (AB 1183) (09-1158 Pet. App. 198-217): On September 30, 2008, California adopted AB 1183, which provided that the rate reductions established by AB 5 would expire on February 28, 2009. 09-958 Pet. App. 44. AB 1183 replaced the prior ten-percent rate reductions with a one-percent reduction, except that it applied a five-percent reduction to ADHCs, pharmacies, and hospital-based nursing-facility and subacute-care services, and continued to impose a ten-percent reduction for inpatient services provided by certain non-contract hospitals. *Id.* at 44, 189. The AB 1183 reductions were scheduled to take effect on March 1, 2009. *Id.* at 189. Those reductions have generally been superseded by subsequent legislation. See Pet. Br. 9 n.3.

Senate Bill 6 (SB 6) (09-1158 Pet. App. 218-227): In February 2009, California passed SB 6, which reduced a cap on the State's maximum contribution to wages and benefits paid to employees by counties for In-Home Supportive Services (IHSS). *Id.* at 65. That reduction was scheduled to take effect on July 1, 2009, but the California Legislature passed a superseding bill that delays implementation until July 2012 and requires a court to validate the reduction prior to implementation. See Cal. Welf. & Inst. Code § 12306.1(d)(6)-(7) (West Supp. 2011).

3. The consolidated certiorari petitions encompass five lawsuits that produced several district court and court of appeals opinions—all of which ultimately resulted in a court order preliminarily enjoining the challenged rate reductions as inconsistent with Section 1396a(a)(30)(A).

a. Respondents in No. 09-958 (*Indep. Living*)—a group of pharmacies, health care providers, senior citi-

zen groups, and individual Medi-Cal beneficiaries—filed a petition in state court for a writ of mandamus seeking to enjoin petitioner from implementing certain provisions of AB 5, and alleging that the rate reductions are inconsistent with the requirements of 42 U.S.C. 1396a(a)(30)(A) and are on that basis preempted. 09-958 Pet. App. 3-5. Petitioner removed the suit to federal court, and respondents moved for a preliminary injunction, which the district court denied. *Id.* at 5-6. Following circuit precedent, the district court explained that Section 1396a(a)(30)(A) does not confer individual rights enforceable under 42 U.S.C. 1983. No. 08-3315, 2008 WL 4298223, at *3 (C.D. Cal. June 25, 2008). The court then held that respondents did not have an implied right of action to pursue their preemption claim under the Supremacy Clause. *Id.* at *4-*5.

The court of appeals reversed. 09-958 Pet. App. 58-93. The court explained that "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under [Section] 1983 be met." *Id.* at 68. The court continued: "For more than a century, federal courts have entertained suits seeking to enjoin state officials from implementing state legislation allegedly preempted by federal law." *Id.* at 83. Seeing "no reason to depart from the general rule in this case, or in this category of cases," the court held "that a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs." *Ibid.* This Court denied certiorari. 129 S. Ct. 2828 (2009).

On remand, the district court granted a preliminary injunction in relevant part. 09-958 Pet. App. 94-124. The court later clarified that its injunction applied only

prospectively, to payments made for services provided on or after the date on which the preliminary injunction was entered. *Id.* at 125-126, 128-129 n.1. The court of appeals affirmed the district court's order granting a preliminary injunction, but reversed the subsequent order granting only prospective relief. *Id.* at 1-38, 54-57.[1]

b. The petition in No. 09-1158 (*Cal. Pharm.*) encompasses three cases:

In *Independent Living Center* v. *Maxwell-Jolly*, No. 09-382 (C.D. Cal.) (*Independent Living*), a group of pharmacies, pharmacists, and other health care providers filed suit in federal court seeking an injunction to prevent petitioner from implementing the five-percent rate reduction for pharmacy services imposed by AB 1183, and alleging that it is inconsistent with the requirements of Section 1396a(a)(30)(A) and thus preempted. 09-1158 Pet. App. 53-54, 128-130, 133. The district court granted a preliminary injunction, and the court of appeals affirmed. *Id.* at 53-58, 128-151.

In *California Pharmacists Ass'n* v. *Maxwell-Jolly*, No. 09-722 (C.D. Cal.) (*California Pharmacists*), a group of ADHCs, hospitals, pharmacies, and Medi-Cal beneficiaries filed suit in federal court seeking an injunction to prevent petitioner from implementing certain five-percent rate reductions imposed by AB 1183, because, they allege, those reductions are inconsistent with Section 1396a(a)(30)(A). 09-1158 Pet. App. 84-87, 95-96, 106-108, 111-112. The district court preliminarily enjoined the rate reduction for ADHCs, but declined to enjoin the reduction for certain hospital services be-

---

[1] Petitioner did not challenge the retroactive-payments holding in its petition. 09-958 Pet. 11 n.4.

cause, the court found, respondents had not demonstrated irreparable harm. *Id.* at 104, 126-127.[2]

The court of appeals affirmed in part, but held that the district court abused its discretion in denying a preliminary injunction with respect to the hospital-service rate reductions. 09-1158 Pet. App. 1-41. The court of appeals reasoned that "a finding of irreparable harm does not turn on 'whether the plaintiffs asserting the economic injury were in any sense intended beneficiaries of the federal statute on which the Supremacy Clause cause of action was premised.'" *Id.* at 38-39 (citation omitted); see *id.* at 46-48. Rather, the court continued, a "cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights" and, therefore, respondents "could enforce the structural relationship between the federal and state governments so long as they had Article III standing as, essentially, private enforcers of the Supremacy Clause." *Id.* at 39 (citation omitted).

In *Dominguez* v. *Schwarzenegger*, No. 09-2306 (N.D. Cal.), recipients of services under the IHSS program and unions representing IHSS providers filed a putative class action in federal court seeking to enjoin petitioner from implementing the SB 6 cap on contributions to IHSS providers because, they alleged, it is preempted by Section 1396a(a)(30)(A). 09-1158 Pet. App. 61. The district court certified a class of IHSS consumers in certain counties and granted a preliminary injunction. *Id.* at 161-175; *Dominguez* v. *Schwarzenegger*, 270 F.R.D. 477 (N.D. Cal. 2010). The court of appeals affirmed. 09-1158 Pet. App. 59-83.

---

[2] Because the district court had already enjoined the pharmacy rate reductions in *Independent Living*, it considered that request moot. 09-1158 Pet. App. 86-87.

c. Respondents in No. 10-283 (*Santa Rosa*), all non-contract hospitals, filed suit in federal court seeking an injunction to prevent petitioner from implementing the ten-percent rate reduction for non-contract hospitals imposed by AB 5, because, they allege, it is inconsistent with, and preempted by, Section 1396a(a)(30)(A).[3] 10-283 Pet. App. 10-13. The district court granted a preliminary injunction and the court of appeals affirmed. *Id.* at 1-4, 24.

4. In September and December 2008, the State submitted to HHS for approval State Plan Amendments (SPAs) for the rate reductions encompassed in AB 5 and AB 1183. On November 18, 2010, HHS disapproved the SPAs. No. 09-958 Gov't Pet. Br. App. 1a-4a. The disapproval letter explained that HHS could not approve the amendments because, among other things, "California has not demonstrated that it would meet the conditions set out in" Section 1396a(a)(30)(A), *id.* at 2a, specifically the condition "that State plans assure that 'payments [to providers] . . . are sufficient to enlist enough providers so that care and services are available under the [State's Medicaid] plan [to recipients] at least to the extent that such care and services are available to the general population in the geographic area,'" *ibid.* (quoting 42 U.S.C. 1396a(a)(30)(A)) (brackets in original). The State requested reconsideration of the disapproval, *id.* at 5a-7a, which triggered a formal administrative hearing process, see p. 3, *supra*. Several of the respondents in these cases have been granted leave to file briefs as amici curiae in the administrative proceeding. Pet. Br. 8 n.2.

---

[3] Respondents had initially also sought to enjoin the ten-percent rate reduction imposed on non-contract hospital services by AB 1183, but, while the case was pending, that reduction was stayed by the Ninth Circuit in *California Pharmacists*. 10-283 Pet. App. 11 n.2.

SUMMARY OF ARGUMENT

1. Respondents do not dispute that there is no statutory private right of action to enforce 42 U.S.C. 1396a(a)(30)(A), either under 42 U.S.C. 1983 or directly under the Medicaid Act. Section 1396a(a)(30)(A) does not itself create an individual entitlement to a certain level of payments or to covered services that would be enforceable under this Court's decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). It instead provides broad criteria to guide HHS's determinations regarding the adequacy of the methods and procedures set out in a State's Medicaid plan.

2. This Court has never squarely decided if or when a private party has a cause of action to enjoin operation of state law as preempted by a federal statute that itself contains no private right of action and that does not confer individual rights enforceable under Section 1983. The Court has, however, decided dozens of preemption claims against state officials on their merits in cases brought in federal court, perhaps implicitly assuming that some federal cause of action exists in some circumstances. Although the Court has not explored the nature or source of the cause of action, its cases reflect a longstanding practice of permitting private parties to bring suit in federal court to enjoin state regulatory action from which the plaintiffs claim immunity under federal law.

The present cases do not require the Court either to reexamine that practice or otherwise attempt to catalog the range of circumstances under which a nonstatutory cause of action may be available to enjoin state officials from violating federal law. Respondents' claims differ from those in the Court's previous cases in at least two relevant respects. First, unlike the vast majority of the

cases in which this Court has entertained suits to enjoin state law as preempted by federal law, the present cases concern allegedly preempted state laws (*i.e.*, the State's challenged rate reductions) that are carried out as part of the State's implementation of the allegedly preemptive federal law (*i.e.*, Medicaid), a joint federal-state program enacted by Congress as part of the SSA, pursuant to Congress's powers under the Spending Clause. And second, respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law, nor do they seek immunity from allegedly preempted state regulation that the State seeks to impose on them.

3. Assuming a nonstatutory cause of action is available in certain circumstances to vindicate the supremacy of federal law, the relevant features of the statutory scheme counsel against recognizing a nonstatutory cause of action for Medicaid providers and beneficiaries to enforce Section 1396a(a)(30)(A).

Section 1396a(a)(30)(A) differs from many other provisions of federal law in that it is part of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority. In creating such a program, Congress may vest the administering federal agency with exclusive responsibility for ensuring the State's compliance with particular provisions, or it may choose to supplement agency enforcement with private judicial enforcement. Here, Congress has not provided for private enforcement, either in a right of action under the statute itself or under 42 U.S.C. 1983; recognition of a nonstatutory private right of action would be inconsistent with the nature of the federal-state relationship in this setting. The Medicaid program operates in a manner similar in some respects to a contract between the

federal government and the State. As a general rule, third-party beneficiaries to a contract have no right to sue for enforcement unless they are the intended, rather than incidental, beneficiaries of the contract, such that they were intended to have a right to sue. In light of Congress's decision not to provide a right of action, this parallel counsels against recognizing a nonstatutory private right of action in this case.

With respect to federal-state cooperative programs under the SSA, the Court's cases and subsequent enactments reinforce that conclusion. Whereas the Court has assumed the existence of a nonstatutory cause of action in some circumstances, both the Court and Congress have assumed that no such cause of action exists to enforce the terms of federal-state programs under the SSA. That understanding is reflected in amendments to the SSA enacted by Congress in 1994.

Finally, regardless of whether it would be invoked in a Section 1983 suit or an injunctive action of the sort the court of appeals authorized here, the language of Section 1396a(a)(30)(A) itself provides little guidance to courts about how to apply and balance the general, and sometimes competing, policy objectives outlined in the provision. The language of Section 1396a(a)(30)(A) therefore calls for interpretation and evaluation by the responsible agency, rather than private judicial enforcement.

ARGUMENT

MEDICAID PROVIDERS AND BENEFICIARIES CANNOT MAINTAIN A CAUSE OF ACTION FOR EQUITABLE RELIEF TO ENFORCE 42 U.S.C. 1396a(a)(30)(A) AGAINST STATE OFFICIALS

The Department of Health and Human Services is committed to ensuring that State Medicaid programs

afford beneficiaries meaningful access to covered care and services. It is essential under 42 U.S.C. 1396a(a)(30)(A) that States carefully consider what impact payment rate changes may have on the availability of providers sufficient to furnish covered care and services to Medicaid beneficiaries. To that end, HHS recently promulgated a proposed rule to "create a standardized, transparent process for States to follow as part of their broader efforts to" comply with Section 1396a(a)(30)(A). 76 Fed. Reg. 26,342 (2011).

The question in these cases, however, does not concern the States' substantive obligations under Section 1396a(a)(30)(A), but whether Medicaid providers and beneficiaries have a right of action to sue state officials to enjoin the operation of state law that is assertedly not in compliance with Section 1396a(a)(30)(A). As we explain below, given the features of that provision and the statutory scheme in which it appears, no such private right of action is available.

A. No Federal Statute Provides A Private Cause Of Action To Enforce 42 U.S.C. 1396a(a)(30)(A) Against State Officials

Respondents do not assert a private right of action to enforce violations of 42 U.S.C. 1396a(a)(30)(A) under 42 U.S.C. 1983 or directly under the Medicaid Act. Nor have they disputed that no such statutory cause of action exists under this Court's precedents.

1. To seek redress under 42 U.S.C. 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). In *Blessing*, the Court set forth three "factors" for courts to consider in deciding whether a statute confers a right enforceable under

42 U.S.C. 1983: (1) whether Congress "intended that the provision in question benefit the plaintiff," (2) whether "the right assertedly protected by the statute is" "so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the provision is "couched in mandatory, rather than precatory, terms." 520 U.S. at 340-341 (citations omitted). In *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the Court clarified that "anything short of an unambiguously conferred right" could not "support a cause of action brought under" 42 U.S.C. 1983, and emphasized that only "*rights*, not the broader or vaguer 'benefits' or 'interests,' * * * may be enforced under the authority of that section." *Ibid.*

After *Gonzaga*, nearly every court of appeals to consider the issue, including the Ninth Circuit, has correctly held that 42 U.S.C. 1396a(a)(30)(A) does not confer on Medicaid providers or beneficiaries individual private rights enforceable under 42 U.S.C. 1983. See *Equal Access for El Paso, Inc.* v. *Hawkins*, 509 F.3d 697, 703-704 (5th Cir. 2007) (providers and beneficiaries), cert. denied, 129 S. Ct. 34 (2008); *Mandy R.* v. *Owens*, 464 F.3d 1139, 1147-1148 (10th Cir. 2006) (providers and beneficiaries), cert. denied, 549 U.S. 1305 (2007); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 542-543 (6th Cir. 2006) (providers and beneficiaries); *New York Ass'n of Homes & Servs. for the Aging* v. *DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam) (providers); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1058-1062 (9th Cir. 2005) (providers and beneficiaries); *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004) (providers). But see *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1016 (8th Cir. 2006) (declining to recon-

sider prior circuit precedent holding that Section 1396a(a)(30)(A) is enforceable by providers and beneficiaries through Section 1983), cert. granted, judgment vacated in part, 551 U.S. 1142 (2007) (mem.).[4]

As the courts of appeals have concluded, Section 1396a(a)(30)(A) does not contain "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 287 (citation omitted). Section 1396a(a)(30)(A) provides that "methods and procedures" must be included in State plans "relating to" utilization and payment to assure that payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers so that care and services are available" to the extent that they "are available to the general population in the geographic area." 42 U.S.C. 1396a(a)(30)(A). That provision is directed at the "overall methodology" of the State plan. *Sanchez*, 416 F.3d at 1059. It makes no express mention of individual Medicaid beneficiaries and it speaks of Medicaid providers not as rights holders but as being "'enlisted' as subordinate partners in the administration of Medicaid services." *Ibid.* Like the "substantial compliance" provision at

---

[4] In *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), this Court held that the Boren Amendment, which required States to make payments based on rates that "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" providing inpatient hospital, skilled nursing, and other institutional services (42 U.S.C. 1396a(a)(13)(A) (1988)), created a right enforceable by Medicaid providers under Section 1983. In the Balanced Budget Act of 1997, Congress repealed the Boren Amendment and replaced it with a more limited requirement that States provide for public notice-and-comment participation in their ratemaking processes for such institutional services. Pub. L. No. 105-33, § 4711, 111 Stat. 507-508 (42 U.S.C. 1396a(a)(13)(A)).

issue in *Blessing*, Section 1396a(a)(30)(A), on its own, is a "yardstick" for designing and evaluating "*systemwide* performance" based on "the aggregate services provided by the State." 520 U.S. at 343 (concluding that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the SSA] was not intended to benefit individual children and custodial parents"). Section 1396a(a)(30)(A) thus does not itself unambiguously create an "*individual* entitlement to services." *Ibid.*

As the courts of appeals have also concluded, the language of Section 1396a(a)(30)(A) is "broad and nonspecific." *Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment)); accord *Sanchez*, 416 F.3d at 1060. Neither the Act nor any regulations promulgated by the Secretary identify a standard by which these broad policy objectives—"efficiency," "economy," "quality of care," and "enlist[ing]" enough providers to make care and services "available * * * at least to the extent that such care and services are available to the general population in the geographic area," 42 U.S.C. 1396a(a)(30)(A)—are to be measured. Cf. *Blessing*, 520 U.S. at 340-341 (stating that enforcement of "vague and amorphous" provision "would strain judicial competence") (citation omitted); Gov't Br. at 15, *Belshe* v. *Orthopaedic Hosp.*, No. 96-1742 (Nov. 26, 1997) (making similar argument regarding "efficiency, economy, and quality of care"). Nor do they give any guidance as to how a court should balance such general, and sometimes competing, policy objectives.[5] See *Sanchez*, 416 F.3d at

---

[5] The proposed rule recently promulgated by the Secretary does not provide "nationwide standards" or adopt a "singular approach" to com-

1059-1060. The inquiry necessarily turns on determinations and predictions of legislative fact of the sort appropriate for expert judgment by the State and then by HHS. Interpretation and weighing of these objectives in private Section 1983 suits would require the courts to make policy judgments in the first instance and would not provide the opportunity for broader public input often associated with agency decisionmaking. Cf. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment).

2. It is also undisputed that the Medicaid Act itself affords providers and beneficiaries no statutory cause of action to enforce Section 1396a(a)(30)(A) against noncompliant States. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6 (1980) (stating that the SSA, of which the Medicaid Act is a part, "affords no private right of action against a State"). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights," as is the case here, "there is no basis for a private suit, whether under [Section] 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286; see *Suter* v. *Artist M.*, 503 U.S. 347, 363-364 (1992).

B. This Court Has Never Squarely Decided If Or When A Nonstatutory Cause Of Action For Equitable Relief On Preemption Grounds Should Be Recognized Under The Supremacy Clause Or Otherwise

The Court need not decide in these cases if or when a private party can bring a federal nonstatutory cause of action for equitable relief against state officials on preemption grounds as a general matter. These cases are

---

pliance, 76 Fed. Reg. at 26,344, but instead requires States to develop data on access to services to facilitate compliance determinations by the State and HHS, *id.* at 26,349.

unlike the vast majority of preemption claims the Court has entertained to date, because they arise under a cooperative federal-state program under the SSA, enacted pursuant to Congress's powers under the Spending Clause. As explained in Part C, *infra*, the Court should resolve the question presented based on the particular features of that statutory scheme.

1. This Court has never squarely decided if or when a cause of action for equitable relief should be recognized directly under the Supremacy Clause, in the absence of a federal statutory cause of action. The Court has held that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. [] 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). But the question at issue in *Shaw*, of subject matter jurisdiction, is analytically distinct from the question whether the Court should recognize a private right of action directly under the Supremacy Clause to seek injunctive relief against implementation of state law that allegedly conflicts with federal law. See *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); see *id.* at 642 (not deciding whether there was a private cause of action).

The Court has, however, decided dozens of preemption claims against state officials on their merits in cases

brought in federal court, perhaps implicitly assuming that some federal cause of action exists in some circumstances. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *PhRMA* v. *Walsh*, 538 U.S. 644 (2003) (plurality opinion). Some Members of the Court have expressed approval in some contexts of a federal cause of action to prevent enforcement against plaintiffs of an allegedly preempted state law in the absence of a right under Section 1983. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (plaintiffs may pursue preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," because "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of [Section] 1983") (citing 28 U.S.C. 1331, 2201, 2202). Others have raised doubts about the existence of a nonstatutory private cause of action in certain contexts. See, *e.g.*, *PhRMA*, 538 U.S. at 683 (Thomas, J., concurring in the judgment) (noting "serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise"). The Court has never, however, directly addressed the existence, source, or scope of a nonstatutory private right of action to enjoin state officials from enforcing a state statute, regulation, or policy that allegedly conflicts with, and is thus preempted by, federal law.

2. The Court's cases do, however, reflect a long-standing practice of entertaining suits by private parties in federal court to enjoin state regulatory action to which the plaintiffs claim immunity under federal law. (Cf. *Golden State Transit*, 493 U.S. at 113 (Kennedy, J., dissenting) (The Court has long permitted "a private party [to] assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States."). The underlying suit in *Ex parte Young*, 209 U.S. 123 (1908), is an early example. Some have described *Young* as invoking the accepted principle of equity jurisprudence that a plaintiff could bring a suit to bar an action at law against which the plaintiff in equity would have a valid defense, where the plaintiff in equity (the defendant in the prospective action at law) did not have an adequate remedy at law. See *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1643 (2011) (*VOPA*) (Kennedy, J., concurring) (describing the underlying suit in *Young* as "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law," and citing John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 997-999 (2008));[6] cf. 4 John Norton Pomeroy, Jr., *Equity Jur-*

---

[6] The origins of the cause of action underlying this Court's decision in *Young* present a question distinct from the *Young* doctrine as it relates to a State's Eleventh Amendment immunity from suit, and the origins of the cause of action therefore do not define the outer limits of the *Young* doctrine concerning the Eleventh Amendment. Thus, the principles of Eleventh Amendment immunity established in *Young* apply both where the plaintiff's cause of action is conferred by a federal statute, such as 42 U.S.C. 1983, and where the cause of action is judi-

risprudence §§ 1360-1364 (4th ed. 1919); 1 C.L. Bates, *Federal Equity Procedure* § 540 (1901).

Although the question now before the Court asks specifically whether respondents have an implied right of action directly under the Supremacy Clause, this Court's cases suggest that may not be the only, or even the best, understanding of the source of a nonstatutory cause of action to enjoin enforcement of state action that is inconsistent with federal law. The Supremacy Clause, as this Court has often stated, is not itself a source of federal rights, but rather "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit*, 493 U.S. at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)) (brackets in original); cf. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116-129 (1965) (challenge to a state law as preempted did not require a three-judge court under former 28 U.S.C. 2281 (1964), which required such a court whenever a statute was sought to be enjoined "upon the ground of the unconstitutionality of such statute"). The Court's practice may be better understood as rooted in the courts' historical exercise of equitable powers.[7] But whether or not that

---

cially fashioned. And as the Court recently reaffirmed in *VOPA*, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" 131 S. Ct. at 1639 (quoting *Verizon Md.*, 535 U.S. at 645) (brackets in original).

[7] The Court's practice originated before the development of modern implied-cause-of-action jurisprudence. See *Bush* v. *Lucas*, 462 U.S. 367, 373 & n.10 (1983) (discussing "common-law approach to the judicial recognition of new causes of action"); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (discussing development of Court's modern jurispru-

is the correct (or only) underpinning of the Court's practice of resolving preemption cases brought in federal court on the merits, the ability of private parties to obtain protection in the face of state compulsion that violates federal law has considerable historical grounding and appropriately vindicates the supremacy of federal law.

3. To resolve the question in these cases, however, the Court need not (and should not) consider the full range of circumstances in which a suit for injunctive relief would lie based on claimed preemption of state law. There are particular reasons why recognition of a nonstatutory private right of action to enforce the federal statutory provision at issue would not be compatible with the nature of the statute, the methods for its enforcement, and the plaintiffs' claim.

These cases are distinct from the many cases in which the Court has allowed claims to proceed with the assumption that a cause of action exists. Here, while respondents frame their claims as sounding in "preemption," they use that term "in a rather special sense," since, unlike many preemption cases, these cases "do[] not involve arguable federal pre-emption of a wholly

---

dence). That practice may reflect a pre-*Erie* understanding that the "general" law recognized such suits in equity. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (noting federal courts' creation of common-law rights before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)). Or, perhaps relatedly, it may reflect an understanding that the conferral of jurisdiction on a federal court allowed it to exercise such equitable authority in certain circumstances. See *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting) (noting possibility of pursuing certain preemption claims "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes"). In any event, the practice is now well established and serves an important purpose in vindicating the supremacy of federal law.

independent state program dealing with the same or a similar problem." *New York State Dep't of Social Servs.* v. *Dublino*, 413 U.S. 405, 411 n.9 (1973). Medicaid is a joint federal-state program enacted by Congress as part of the SSA, pursuant to its powers under the Spending Clause, and the State's rate reductions are carried out as part of the implementation of that program and in the context of the State's bilateral undertaking with the federal government. And, unlike the vast majority of the cases in which the Court has considered preemption claims brought in federal court on their merits, respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law. Nor do they seek immunity from allegedly preempted state regulation that the State seeks to impose on them. The challenged Medi-Cal rate reductions do not regulate respondents' primary conduct. Rather, they offer providers less money for certain services than what allegedly should be paid under the cooperative federal-state Medicaid program—and, in turn, allegedly limit the availability of those services to beneficiaries.

4. Since *Gonzaga*, this Court has decided only one case, *PhRMA* v. *Walsh*, in which a private party sued in federal court to enjoin state officials from enforcing an allegedly preempted state law in circumstances that could arguably be described as similar to those here. The court below extensively relied on that case in reaching its conclusion that a nonstatutory cause of action is available to respondents here. See 09-958 Pet. App. 77-83. But that case differed in important respects from

these cases, and this Court's decision in any event provides little support for the decisions below.[8]

In *PhRMA*, a pharmaceutical manufacturers' association sued to enjoin a Maine program designed to obtain discounted drug prices for persons not covered by Medicaid. To encourage participation, Maine required drug companies that refused to participate in that program to submit their drugs to prior-authorization procedures under Medicaid. 538 U.S. at 649-650. The statutory (or nonstatutory) basis for the cause of action was not addressed by the Court. Cf. *id.* at 683 (Thomas, J., concurring in the judgment).[9] And, of course, the ques-

---

[8] The government's amicus brief at the petition stage noted that the Court's decision in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), might not "necessarily fit [the] description" of a case in which "the plaintiff was regulated by the challenged state law and could have raised a preemption defense in any enforcement action for noncompliance." See 09-958 Gov't Pet. Br. 17-18. In *Crosby*, the plaintiff —a nonprofit corporation representing entities that did business with Burma—sought to enjoin enforcement of a state law that generally precluded state agencies from purchasing goods or services from companies that did business with Burma. 530 U.S. at 367-370. Although a company's contract ineligibility may not have been imposed through formal proceedings initiated by the State in which preemption could have been raised as a defense, the state law was an affirmative (and independent) exercise of the State's authority to impose and enforce what were essentially state regulatory standards. *Id.* at 373 n.7. Moreover, because the Constitution's allocation of foreign affairs powers to the national government was the basis for the alleged preemption, there was a particular structural foundation for a suit to enjoin the state law.

[9] In the court of appeals, and in this Court, the State did argue that PhRMA lacked prudential standing. See *PhRMA* v. *Concannon*, 249 F.3d 66, 72-73 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003); Resp. Br. at *13-*17, *PhRMA*, *supra* (01-185). The court of appeals rejected that argument, 249 F.3d at 73, but this Court did not address it, perhaps because it did not view the issue as properly presented. Cf. Reply Br.

tion whether a cause of action exists, unlike the existence of federal jurisdiction, may be assumed without being decided. See *Burks* v. *Lasker*, 441 U.S. 471, 476 & n.5 (1979); cf. *Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings * * * have no precedential effect.").

However the Court might have resolved that question had it been presented, *PhRMA* arose in a different context than these cases. The question in *PhRMA* was not whether the State had complied with obligations imposed on it as a condition of receiving federal Medicaid funds, but whether the State's use of its Medicaid authority as a tool to impose on drug manufacturers an independent state rebate requirement was consistent with the Medicaid statute. Thus, unlike these cases, the state law at issue in *PhRMA* constituted an affirmative exercise of the State's authority to impose and enforce what were, in essence, state regulatory requirements directed to the pharmaceutical companies' primary conduct outside the Medicaid program—and the companies were, in effect, asserting an immunity from those regulations.

C. The Creation Of A Nonstatutory Private Cause Of Action For Equitable Relief To Enforce 42 U.S.C. 1396a(a)(30)(A) Against State Officials Would Not Be Compatible With The Nature Of The Statutory Scheme

These cases do not require the Court either to broadly determine whether and under what circumstances a nonstatutory cause of action might be available to enjoin state officials from violating federal law, or to reexamine its cases reaching the merits of preemption claims brought in federal court. Assuming a nonstatutory

---

at *1 & n.1, *PhRMA*, *supra* (01-188) (arguing that the issue was not properly before the Court).

cause of action is properly available in certain circumstances to vindicate the supremacy of federal law, several considerations counsel against recognizing a nonstatutory private cause of action for Medicaid providers and beneficiaries to enforce Section 1396a(a)(30)(A).

1. First, as a general matter, Section 1396a(a)(30)(A) is a provision of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority, as to which Congress neither provided an express right of action for private parties nor conferred individually enforceable rights. Recognition of a nonstatutory cause of action for Medicaid providers and beneficiaries in this setting would be in tension with the nature of the federal-state relationship and the enforcement scheme contemplated by the statute.

a. In *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342, 1345 (2011), the Court declined to recognize a third-party-beneficiary claim to enforce the terms of a contract between HHS and a drug company where the contractual terms were dictated by a federal-state cooperative program enacted under Congress's Spending Clause authority. There, as here, the parties did not dispute that there was no private right of action under the statutory provision at issue: the statute instead vested enforcement authority in HHS. *Id.* at 1347-1348. The Court relied in part on the fact that, in those circumstances, to allow a suit on a third-party-beneficiary rationale would have rendered meaningless the absence of a private right of action under the statute itself. *Id.* at 1348. Such a suit, the Court explained, "is in essence a suit to enforce the statute itself." *Ibid.* In those circumstances, the Court concluded, it would make "scant sense" to allow that claim to go forward "[n]o matter the clothing in which [the plaintiffs] dress their claims." *Id.*

at 1345 (quoting *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005)) (first brackets in original).

Similar considerations are present here. If private parties who lack a statutory cause of action could simply style their suit as a preemption action to enjoin state officials from enforcing a state law that was adopted to implement the State's undertakings pursuant to the program, the result would be in considerable tension with Congress's decision not to confer a private right of action to enforce state compliance. In *Suter*, for example, the plaintiffs' claim that the State had not made "reasonable efforts" at family reunification in its judicial proceedings, 503 U.S. at 352, could have been re-pleaded as a claim that the State's inadequate efforts were preempted by the "reasonable efforts" provision of the Adoption Act. The State's alleged failure to abide by Title IV-D's "substantial compliance" requirements in *Blessing*, 520 U.S. at 332-333, would have been cognizable had plaintiffs instead challenged the State's program as preempted by the "substantial compliance" provision. And, in *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001), the plaintiffs could have pursued their claim that the State's policy of offering its driving-license exam only in English violated the Department of Justice's disparate-impact regulation by the simple expedient of filing suit "under the Supremacy Clause," instead of under Title VI of the Civil Rights Act of 1964.

That most of the respondents here are seeking only injunctive relief (but see note 1, *supra*) does not mitigate the inconsistency between private judicial enforcement and the federal-state cooperative scheme that Congress created. Significantly, in all of the cases mentioned above, the plaintiffs sought only prospective relief and not damages. *E.g.*, *Suter*, 503 U.S. at 352; *Blessing*,

520 U.S. at 337; *Sandoval*, 532 U.S. at 279; see also *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 504 & n.4 (1990).[10]

b. This Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract" between the federal government and the State. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). This Court has also recognized that neither the federal Spending Clause statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985).[11] But private parties are in a situation similar to that of third-party beneficiaries. Under traditional contract principles, third parties have judicially enforceable rights only if they are intended, rather than incidental, beneficiaries of the contract, and only if "recognition of a right to performance in the beneficiary is appropriate

---

[10] Section 1983 does not provide a cause of action against States or state employees in their official capacity for damages. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). And, unless properly abrogated, sovereign immunity would bar retrospective damage remedies in cases asserting an implied statutory right of action against state officials acting in their official capacity. See *Quern* v. *Jordan*, 440 U.S. 332, 337-349 (1979); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974).

[11] The Act of Congress establishing the joint federal-state program, for example, remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause. *E.g.*, *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (state law providing for attachment of federal benefits paid to state prisoners preempted by SSA); *Philpott* v. *Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973) (state law requiring reimbursement through payment of federal disability benefits preempted by SSA).

to effectuate the intention of the parties." Restatement (Second) of Contracts § 302(1) (1981). When the contract is a government contract, "[t]he distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention" is vigorously enforced. 9 John E. Murray, Jr., *Corbin on Contracts* § 45.6, at 92 (rev. ed. 2007); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230-231 (1912). In light of Congress's decision not to confer individual rights under Section 1396a(a)(30)(A), see pp. 13-15, *supra*, the analogy to third-party beneficiaries counsels against creating a nonstatutory right of action to enforce Section 1396a(a)(30)(A).

2. This Court's cases and subsequent enactments reinforce the conclusion that no extra-statutory cause of action should be recognized to enforce provisions of the federal-state cooperative programs enacted as part of the SSA, including Section 1396a(a)(30)(A). In contrast to an implicit assumption that a nonstatutory private cause of action was available in the numerous preemption cases this Court has decided in other contexts (see pp. 17-21, *supra*), the shared assumption of the Court and Congress appears to have been that no such cause of action is available to challenge actions by state officials on the ground that they are allegedly inconsistent with provisions of the SSA that govern state plans under cooperative federal-state programs.

a. In *Thiboutot*, *supra*, this Court first made explicit the conclusion that the cause of action conferred by 42 U.S.C. 1983 is presumptively available not only to redress violations of the Constitution or statutes assuring equal protection, but to redress violations of all federal statutes that confer individual rights, including

statutes enacted pursuant to Congress's authority under the Spending Clause. In addition to the plain language of 42 U.S.C. 1983 (namely, the general reference to "and laws"), the Court relied heavily on its prior cases, which it read as resolving "any doubt" about the meaning of that phrase. *Thiboutot*, 448 U.S. at 4-5. In noting that several of its prior cases involving the SSA had (explicitly or implicitly) relied on the availability of a cause of action pursuant to Section 1983 for claims based on violations of federal statutes, *id.* at 4-6, the Court clearly viewed Section 1983 as the sole source of a private right of action to enforce statutory provisions governing joint federal-state programs under the SSA. As the Court explained, in all of those cases, Section 1983 "was necessarily the exclusive statutory cause of action because, as this Court held in [*Edelman* v. *Jordan*, 415 U.S. 651, 673-674 (1974)], the SSA affords no private right of action against a State." *Thiboutot*, 448 U.S. at 6. If a nonstatutory cause of action arising under the Supremacy Clause or on some other basis had been readily available, the critical premise underlying the Court's reasoning—that "any doubt" as to the meaning of "and laws" in Section 1983 had already been resolved—would have been unfounded. Each of the prior cases equally could have been explained as arising under that nonstatutory cause of action. See *ibid.* (string cite of cases seeking prospective relief from state programs alleged to be "inconsistent" with provisions of the SSA). A holding by this Court that a nonstatutory private cause of action is *also* available (and always has been) would be in considerable tension with that decision.

b. Two identical provisions of the SSA, added by Congress in 1994, similarly point to the conclusion that provisions of the SSA are privately enforceable only

when a cause of action lies under 42 U.S.C. 1983 or the provision at issue. After this Court's decision in *Suter*, Congress adopted amendments to the SSA that provide:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. 1320a-2, 1320a-10. The Conference Report explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the [SSA] are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter* v. *Artist M.*" H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). The Report also made clear, however, that there was "no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action." *Ibid.*

The amendments indicate that Congress (like the Court) was acting on the understanding that a private right of action would be available to enforce the state

plan provisions of the joint federal-state programs under the SSA only when such a cause of action is available under 42 U.S.C. 1983 (or under established implied-statutory-private-right-of-action principles). Where a cause of action is not available under either Section 1983 or the particular provision of the SSA at issue, the amendments appear to contemplate that the provision simply will not be privately enforceable.

3. Finally, Section 1396a(a)(30)(A)'s "broad and non-specific" language counsels against recognition of a nonstatutory private right of action. The terms the courts of appeals have found to be prohibitively "broad and diffuse" for purposes of Section 1983, see *Sanchez*, 416 F.3d at 1060; pp. 15-16, *supra*, would be no less so in the context of a private suit for injunctive relief brought under the Supremacy Clause or otherwise. Absent more specific guidance about how to measure a State's compliance with the general standards of economy, efficiency, quality of care, and sufficiency of payments to ensure access, such determinations are ones properly made by HHS through the exercise of its expert judgment and its bilateral relationship with the State.

As previously discussed (p. 3, *supra*), the Secretary is required to review and approve (or disapprove) the State's plan and any plan amendments to ensure compliance with Section 1396a(a)'s requirements, including Section 1396a(a)(30)(A). If the Secretary disapproves a State plan (or plan amendment), the State may seek reconsideration (as the State did here, p. 8, *supra*). And if the decision is upheld, the State may petition for judicial review in the court of appeals. Apart from the plan approval process, if the State plan does not comply with Section 1396a(a)(30)(A), the Secretary can also undertake a compliance action and withhold federal funds.

That administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment).[12]

Recognition of a nonstatutory private right of action would mean that multiple federal courts across different jurisdictions would similarly (and perhaps simultaneously) be called on to decide such compliance questions. Judicial proceedings would move forward on different evidentiary records and result in different factual findings, which would in turn be reviewable on appeal only under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a)(6). And, as evidenced by the wide array of approaches the courts of appeals have taken in their interpretation of Section 1396a(a)(30)(A) (see 09-958 Gov't Pet. Br. 10-11), the proceedings would inevitably lead to the development and application of different legal standards. See *Sanchez*, 416 F.3d at 1061 (noting "that exclusive agency enforcement might fit the scheme better than a plethora of private actions threatening disparate outcomes") (internal quotation marks and citation omitted).

---

[12] The United States is not suggesting that Congress has "displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young*." See *Verizon Md.*, 535 U.S. at 647 (quoting *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75 (1996)); *VOPA*, 131 S. Ct. at 1639 n.3. Respondents are essentially asking this Court to create a federal common-law cause of action. Whether or not "these statutory provisions * * * provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose" private remedies, they do demonstrate that the absence of a private remedy would not render Section 1396a(a)(30)(A) a "dead letter." *Suter*, 503 U.S. at 360-361; see *Gonzaga*, 536 U.S. at 289-290.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
LEONDRA R. KRUGER
Acting Deputy Solicitor General
IAN HEATH GERSHENGORN
Deputy Assistant Attorney General
MELISSA ARBUS SHERRY
Assistant to the Solicitor General
MARK B. STERN
DANIEL J. LENERZ
Attorneys

MAY 2011

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

Nos. 09-958, 09-1158, 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, Director, California Department of Health Care Services,
Petitioner,
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*,
Respondents.

TOBY DOUGLAS, Director, California Department of Health Care Services,
Petitioner,
v.
CALIFORNIA PHARMACISTS ASSOCIATION, INC., *et al.*,
Respondents.

TOBY DOUGLAS, Director, California Department of Health Care Services,
Petitioner,
v.
SANTA ROSA MEMORIAL HOSPITAL, *et al.*,
Respondents.

On Writs of Certiorari To The United States Court of Appeals For the Ninth Circuit

---

Brief of *Amici Curiae* AARP, Families USA, et al.,

Complete list of Amici and additional Counsel on Inside Cover

Jane Perkins
(*Counsel of Record*)
National Health Law Program
101 E. Weaver St., # G-7
Carrboro, NC 27510
perkins@healhtlaw.org
(919) 968-6308

Library of Congress
Law Library

Complete list of Amici Curiae

AARP, Families USA, National Legal Aid and Defenders Association, National Health Law Program, National Disability Rights Network, Center for Medicare Advocacy, First Focus, Voices for America's Children, Children's Dental Health Project, National Center for Youth Law, National Housing Law Project, National REACH Coalition, Disability Rights Legal Center, American Network of Community Options and Resources, Planned Parenthood Federation of America, National Family Planning & Reproductive Health Association, National Latina Institute for Reproductive Health, Black Women's Health Imperative, National Asian Pacific American Women's Forum, Asian & Pacific Islander American Health Forum in Support of Respondents

---

Byron J. Gross
National Health Law Program
3701 Wilshire Blvd., Suite 750
Los Angeles, CA 90010
gross@healthlaw.org
(310) 204-6010

Stacy Canan
AARP Foundation Litigation
Michael Schuster
AARP
601 E Street, NW
Washington, DC 20049
scanan@aarp.org
(202) 434-2060

Barbara Jones
AARP Foundation Litigation
200 S. Los Robles, #400
Pasadena, CA 91101
bjones@aarp.org
(626) 585-2628

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. The History And Purpose Of Medicaid Show The Need For Private Enforcement 7

II. California's Across-The-Board Medicaid Rate Cuts Are Incompatible With And Effectively Nullify The Equal Access Provision Of The Social Security Act 12

III. The Supreme Court Has Consistently Recognized That Program Beneficiaries Can Enjoin State Laws That Are Invalid Under The Supremacy Clause, And Congress Has Recognized This Right 16

IV. The Medicaid Act's Statutory Scheme Is Not Inconsistent With The Need For Private Enforcement Of The Supremacy Clause To Prevent State Medicaid Officials From Acting Contrary To Federal Law 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Almenzares v. Wyman,
453 F.2d 1075 (2d Cir. 1971) 24

Ariz. Dep't of Pub. Welf. v. Dep't of Health, Educ. & Welf.,
449 F.2d 456 (9th Cir. 1971) 24-25

Ark. Dept. of Health & Human Servs. v. Ahlborn,
547 U.S. 268 (2006) 17

Bennett v. Arkansas,
485 U.S. 395 (1988) 16

Blum v. Bacon,
457 U.S. 132 (1982) 16

Carleson v. Remillard,
406 U.S. 598 (1972) 17

Chisholm v. Hood,
110 F. Supp. 2d 499 (E.D. La. 2000) 23

City of Rancho Palo Verdes v. Abrams,
544 U.S. 113 (2005) 20

Clayworth v. Bonta,
295 F. Supp. 2d 1110, (E.D. Cal. 2003)
(9th Cir. 2005) *rev'd on other grounds*
140 Fed. App'x 677 (9th Cir. 2005) 14

Concourse Rehab. & Nursing Ctr., Inc. v. Whalen,
249 F.3d 136 (2d Cir. 2001) 17

Dalton v. Little Rock Family Planning Services,
516 U.S. 474 (1996) 17

Elizabeth Blackwell Health Ctr. for Women v. Knoll,
61 F.3d 170 (3d Cir. 1995) 17

Equal Access for El Paso, Inc. v. Hawkins,
509 F.3d 697 (5th Cir. 2007) 12

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 11, 12

Hern v. Beye,
57 F.3d 906 (10th Cir. 1995) 18

Lankford v. Sherman,
451 F.3d 496 (8th Cir. 2006) 18

Lewis v. Hegstrom,
767 F.2d 1371 (9th Cir. 1985) 18

N.Y. State Dep't of Social Servs. v. Dublino,
413 U.S. 405 (1973) 16-17

Pediatric Specialty Care v. Ark. Dep't of Human Servs., 443 F.3d 1015
(8th Cir. 2006) 11

PhRMA v. Concannon,
249 F.3d 66 (1st Cir. 2001) 17

PhRMA v. Walsh,
538 U.S. 644 (2003) 17, 23

Planned Parenthood Affiliates of Mich. v. Engler,
73 F.3d 634 (6th Cir. 1996) 18

Planned Parenthood Fed'n v. Heckler,
712 F.2d 650 (D.C. Cir. 1983) 18

Planned Parenthood of Hous. & Se. Tex. v. Sanchez,
403 F.3d 324 (5th Cir. 2005) 18

Randall v. Lukhard,
729 F.2d 966 (4th Cir. 1984) (en banc) 17, 18

Rosado v. Wyman,
397 U.S. 397 (1970) 24

Schweiker v. Gray Panthers,
453 U.S. 34 (1981) 10

Selig v. Pediatric Specialty Care,
551 U.S. 142 (2007) 11

Suter v. Artist M.,
503 U.S. 347 (1992) 18, 19

Townsend v. Swank,
404 U.S. 282 (1971) 16

Va. Office for Prot. & Advocacy v. Stewart,
131 S.Ct. 1632 (2011) 21

Wilder v. Va. Hosp. Ass'n,
496 U.S. 498 (1990) 20, 25

Zbaraz v. Quern,
596 F.2d 196 (7th Cir. 1979) 18

STATUTES AND REGULATIONS

28 U.S.C. §§ 1331 18

Social Security Act
42 U.S.C. § 1316 24
42 U.S.C. §§ 1320a-2 ..... 18, 19, 20
42 U.S.C. §§ 1320a-10 ..... 18, 19, 20
42 U.S.C. § 1361 25
42 U.S.C. § 1396a(a)(8) 10
42 U.S.C. § 1396a(a)(10)(A) 10
42 U.S.C. § 1396a(a)(30)(A) ..... *passim*
42 U.S.C. § 1396c 20, 24
42 U.S.C. §§ 1396-1396w-5 7

42 U.S.C. § 1983 ..... 11, 12, 18, 22

42 C.F.R. §§ 430.30-430.104 24
42 C.F.R. § 430.38 24
42 C.F.R. § 430.76 24

76 Fed. Reg. 26342 (May 6, 2011) 12, 21
76 Fed. Reg. 26343 (May 6, 2011) 12

Administrative Procedure Act
5 U.S.C. § 706(2)(A) 23

Social Security Amendments of 1965,
Pub. L. No. S9-97, 79 Stat. 266 (July 30, 1965) 8

LEGISLALTIVE HISTORY

Karen Davis, Testimony before U.S. Senate, Special Comm. on Aging, The Commonwealth Fund, Time for Change: The Hidden Cost of a Fragmented Health Insurance System (2003), http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=221616 15

H.R. Conf. Rep. No. 761 , 103d Cong., 2d Sess., (1994) *reprinted in* 1994 U.S.C.C.A.N. 2901 19

OTHER AUTHORITIES

Joanna Bisgaier & Karin V. Rhodes, *Auditing Access to Specialty Care for Children with Public Insurance*, 364 N. Eng. J. Med. 2324 (Jun. 16, 2011)..... 13

Stan Dorn, Urban Inst., *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* (2008), http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf 15

Martin Espinoza, *Dental Care Called a Health Care Crisis*, Press Democrat (Santa Rosa, Cal.) June 16, 2011, http://www.pressdemocrat.com/article/20110616/ARTICLES/110619585?p=all&tc=pgall 14

Jack Hadley, Kaiser Comm'n on Medicaid and the Uninsured, *Sicker and Poorer: The Consequences of Being Uninsured* (2002), http://www.kff.org/uninsured/upload/Full-Report.pdf 15

Evan Halper, *Further Fee Cuts Force a Medi-Cal Exodus: Doctors are Rejecting New Patients*, L.A. Times, Mar. 24, 2008, 2008 WLNR 5628983 ..... 13, 14

Duane W. Gang, *Riverside County Threatens to Pull Out of Medi-Cal Mental Health Program*, The Press Enterprise (Riverside, Cal.), Apr. 1, 2008, http://www.pe.com/localnews/healthcare/stories/PE_News_Local_H_board02.430192d.html 13

Guttmacher Inst., *Women of Reproductive Age Hit Hard by Recession, New Census Data Show* (2010), http://www.guttmacher.org/media/inthenews/2010/09/17/index.html 9

Kaiser Comm'n on Medicaid & the Uninsured, Medicaid Matters: Understanding Medicaid's Role in Our Health Care System (Mar. 2011) http://www.kff.org/medicaid/upload/8165.pdf 9, 10, 11

Kaiser Comm'n on Medicaid & the Uninsured, *Top 5 Things to Know about Medicaid* (2011) http://www.kff.org/medicaid/upload/8162.pdf 9

National Health Law Program, *Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983* (June 2011) http://www.healthlaw.org 11

Julia C. Prentice & Steven D. Pizer, *Delayed Access to Health Care and Mortality*, 42 Health Services Res. 644-62 (2007) 13

Rand E. Rosenblatt et al., *Law and the American Health Care System* 415 (1997) 8

Andy Schneider et al., The Kaiser Comm'n on Medicaid and the Uninsured, *The Medicaid Resource Book* (July 2002) 9, 10, 11

David L. Skaggs et al., *Access to Orthopedic Care for Children With Medicaid Versus Private Insurance in California* 107 Pediatrics 1405 (2001) 14

David L. Skaggs et al., *Access to Orthopedic Care for Children With Medicaid Versus Private Insurance: Results of a National Survey*, 26 J. Ped. Orthopaedics 400 (2006) 12

U.S. Dep't of Health, Educ., and Welfare, *Handbook of Public Assistance Administration* § D-5140 Pub. L. No. S9-97 8

Edward C. Wang et al., *Inequality of Access to Surgical Specialty Health Care: Why Children With Government-Funded Insurance Have Less Access Than Those with Private Insurance in Southern California*, 114 Pediatrics 584 (2004) 14

Stephen Zuckerman, Amy Williams & Karen Stockley, Cal. HealthCare Found., *Medi-Cal Physician and Dentist Fees: A Comparison to Other Medicaid Programs and Medicare* 23 (Apr. 2009) http://www.chcf.org/~/media /MEDIA%20LIBRARY%20Files/PDF/M/ PDF%20MediCalFeeComparison.pdf 13, 14

MISCELLANEOUS

Statement of Interest of the United States of America, *John B. v. Emkes*, Feb. 18, 2011 (M.D. Tenn. No. 3-98-0168)..... 22

Statement of Interest of the United States, *Planned Parenthood of Indiana, Inc. v. Commissioner of the Ind. State Dept. of Health*, June 16, 2011 (S.D. Ind. No. 1:11-cv-00630-TWP-DKL)..... 22

Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Douglas v. Indep. Living Ctr. of S. Cal. et al.* (May 2011) (Nos. 09-958, 09-1158, and 10-283).....19, 21

Brief for the United States as *Amicus Curiae*, *Maxwell-Jolly v. Indep. Living Ctr. of S. Cal.*, 572 F.3d 644 (9th Cir. 2009) on petition for cert December 2010 .....21, 23

Brief for the United States as *Amicus Curiae* Supporting Petitioner *Blessing v. Freestone*, 520 U.S. 329 (1997)(No. 95-1441) 23

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations committed to serving the needs of low-income persons, including older Americans, individuals with disabilities, children, and women of child-bearing age. *Amici*'s work involves promoting public awareness of the disproportionate need for health care and barriers to care experienced by these populations and advocating for their interests and legal rights. It is in this last capacity that *amici* submit this Brief, asking the Court to affirm the decisions below.

AARP is a non-partisan, non-profit membership organization for people 50 and over. AARP advocates for health and economic security for everyone and in particular for vulnerable people of all ages, including low-income people and persons with disabilities. AARP supports access to and expansion of quality health care through publicly administered health insurance programs, including Medicaid, an essential safety net program that provides coverage to people who would otherwise be denied health care. To further that end, Medicaid recipients' access to the courts to challenge the denial of Medicaid services is critical. **Families USA** is the national, nonprofit and nonpartisan organization for health care consumers, dedicated to the achievement of high-quality, affordable health

---

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of this brief. No persons other than the *amici*, their members or their counsel made such a monetary contribution. The parties consented to the filing of this brief.

coverage and care for all Americans. For the past 29 years, Families USA has led various coalition efforts to protect and expand health coverage for low-income families, including the National Medicaid Coalition that it chairs.

The **National Legal Aid and Defenders Association** is the largest organization in the United States dedicated solely to securing equal justice for the disadvantaged in the civil and criminal justice systems. NLADA members represent thousands of families in need of adequate health care and access to the courts. The **National Health Law Program** is a 40-year-old public interest law firm that works to advance access to quality health care and protect the legal rights of low-income and underserved people. The **National Disability Rights Network** (NDRN) is the non-profit membership association of protection and advocacy (P&A) agencies that are located in all 50 States, the District of Columbia, Puerto Rico, and the U.S. Territories. For 30 years, P&As have worked with children and adults with disabilities who depend on Medicaid-funded services and supports to enable them to live in the community rather than in institutions. Founded in 1986, the **Center for Medicare Advocacy** is a non-profit public interest law organization that represents older and disabled people throughout the United States. The Center works to advance fair access to Medicare, Medicaid and quality health care through individual representation, education, policy analysis, administrative advocacy, and litigation.

First Focus is a bipartisan advocacy organization that is committed to making children and families a priority in federal policy and budget decisions. In all of its work, First Focus strives to ensure that every child in America has access to the high quality, comprehensive, affordable health care they need to grow up to become healthy and productive adults. For over 25 years, **Voices for America's Children**, the nation's largest network of multi-issue child advocacy organizations, has directly advocated for full implementation of the Medicaid Act, in order to improve access to high-quality, age-appropriate health care for all children in need. The **Children's Dental Health Project** is a national non-profit organization with the mission of creating and advancing innovative solutions to achieve oral health for all children so that they reach their full potential. The **National Center for Youth Law** (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For almost 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. Amicus **National Housing Law Project** is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for low-income people by increasing, preserving and improving the supply of decent, affordable housing; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws. The **National REACH Coalition** was

established in 2004 to challenge community and faith-based organizations, public health agencies and academic institutions working with and in marginalized communities to find effective strategies and community-based interventions to eliminate inequities in health.

The **Disability Rights Legal Center** (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act, and other federal and state laws. The **American Network of Community Options and Resources** (ANCOR) is a nationwide nonprofit association representing and advocating for more than 800 private providers of community living and employment services and supports to more than 500,000 people with disabilities of all ages. For more than 40 years, ANCOR has represented the capacity and ability of private providers to ensure access by the individuals they support, the majority of whom depend upon Supplemental Security Income and Medicaid.

Planned Parenthood Federation of America (PPFA) is the nation's largest and most trusted voluntary reproductive health care organization. PPFA's 83 affiliates operate more than 800 healthcare centers nationwide. In addition to providing reproductive health care, PPFA and its

affiliates are among the nation's most active and widely recognized advocates for increased access to comprehensive reproductive health services and education. PPFA is committed to promoting and preserving full reproductive choice for all people and to providing access to high quality, confidential, reproductive health services. The **National Family Planning & Reproductive Health Association** (NFPRHA) represents the broad spectrum of family planning administrators and clinicians who serve the nation's low-income and uninsured. NFPRHA's more than 400 institutional members operate or fund a network of more than 3,700 health centers and service sites in 48 states and the District of Columbia, providing family planning and other preventive health services to millions of low-income and uninsured individuals each year.

The mission of **National Latina Institute for Reproductive Health** (NLIRH) is to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. NLIRH is the nation's only reproductive health policy and advocacy organization working on behalf of the reproductive health and justice of the nation's Latina women. The **Black Women's Health Imperative** (Imperative) is the only Black national organization dedicated to promoting optimum health for Black women across the life span—physically, mentally and spiritually. The **National Asian Pacific American Women's Forum** (NAPAWF) is the only national, multi-issue Asian and Pacific Islander

(API) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for API women and girls. The **Asian & Pacific Islander American Health Forum** (APIAHF) is a health advocacy non-profit organization dedicated to health justice through improving the health and well-being of more than 17 million Asian Americans, Native Hawaiians, and Pacific Islanders living in the United States and its jurisdictions. APIAHF believes that all persons have the right to be healthy, to live in a thriving community, and to quality, affordable, and accessible health care.

SUMMARY OF ARGUMENT

The impact of California's across-the-board provider rate reductions on Medicaid beneficiaries' already insufficient access to health care is incompatible with and effectively nullifies the Equal Access Provision of the Social Security Act. If these rate reductions were to be implemented, even fewer providers in California would treat Medicaid patients, due largely to payment rates that are insufficient to cover the cost of providing the treatment. Delays in treatment and the inability to locate providers who will accept Medicaid payment are contributing to the poorer health of Medicaid beneficiaries' as compared to the general population.

The history and purpose of the Medicaid Act illustrate the need for and legality of private enforcement when states' violations of the Medicaid Act are harming program beneficiaries. The

Supreme Court has long recognized the right of program recipients and health care providers to enforce the Supremacy Clause and enjoin state laws that are inconsistent with the Medicaid Act or other provisions of the Social Security Act. The statutory scheme of the Medicaid Act does not preclude private enforcement. In other cases, the United States has repeatedly taken the position that private enforcement should complement federal agency remedies. Private enforcement is needed in these cases because the State's payment rates are too low to enlist sufficient numbers of Medicaid participating providers, thus creating barriers to care for Medicaid beneficiaries.

ARGUMENT

I. The History And Purpose Of Medicaid Show The Need For Private Enforcement.

Millions of Americans depend on their states' Medicaid programs operating as the Constitution and Congress intend. Over the history of the program, private enforcement has been the primary means of halting ongoing state violations of federal law and realizing Medicaid's promises and protections.

Title XIX of the Social Security Act established Medicaid in 1965. *See* 42 U.S.C. §§ 1396-1396w-5. Cooperatively funded by the federal and state governments, Medicaid is designed to provide low income program beneficiaries with

insurance that will allow them to obtain care and services from the private health care sector, including hospitals, doctors, pharmacies, and nursing homes. *See* Rand E. Rosenblatt et al., *Law and the American Health Care System* 415 (1997). Congress' "very clear ... intent [was] that the medical and remedial care and services made available to recipients under Title XIX be of high quality and in no way inferior to that enjoyed by the rest of the population." *Id.* at 416, *citing* U.S. Dep't of Health, Educ., and Welfare, *Handbook of Public Assistance Administration* § D-5140.

Before Medicaid was enacted, low income, uninsured people obtained health services through a patchwork of programs, such as hospital charity care and local programs for the poor. This system provided uneven coverage from state to state and within states. The Medicaid Act was intended to change this by providing for a uniform and statewide medical insurance program, while allowing for some variation among states. *See* Social Security Amendments of 1965, Pub. L. No. S9-97, 79 Stat. 266 (July 30, 1965).

Designed to address the more complex health needs of people with disabilities and the limited finances of low income people, Medicaid covers a range of necessary health and support services for people in need. Nearly 60 million people in the United States depend on Medicaid for their health care. Medicaid covers 30 million children (one in every three children in the United States) for medical, dental and developmental screening and

treatment. *See* Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid Matters: Understanding Medicaid's Role in Our Health Care System* 1 (Mar. 2011) [hereinafter *Medicaid Matters*], http://www.kff.org/medicaid/upload/8165.pdf; Kaiser Comm'n on Medicaid & the Uninsured, *Top 5 Things to Know about Medicaid* 2 (2011) [hereinafter *Top 5 Things*], http://www.kff.org/medicaid/upload/8162.pdf. Nearly 15 percent of women between the ages of 15 and 44 rely upon Medicaid for services, including breast and cervical cancer screening and treatment, testing and treatment for sexually transmitted diseases, and pregnancy-related care. *See* Guttmacher Inst., *Women of Reproductive Age Hit Hard by Recession, New Census Data Show* (2010), http://www.guttmacher.org/media/inthenews/2010/09/17/index.html. Over 14 million older persons and people with disabilities depend on Medicaid. Twenty percent of all non-elderly people with disabilities in the United States depend on Medicaid to treat a range of conditions, including "physical impairments, blindness, limitations from spinal cord injury, severe mental and emotional conditions, and other disabling conditions, such as cerebral palsy, cystic fibrosis, Downs Syndrome, mental retardation, muscular dystrophy, autism, spina bifida, and HIV/AIDS." Andy Schneider et al., The Kaiser Comm'n on Medicaid and the Uninsured, *The Medicaid Resource Book* 18 (July 2002). Medicaid is the largest single purchaser of long-term care services for the elderly and non-elderly people with disabilities in the United States. For example, seven of every ten nursing home residents are covered by Medicaid, and Medicaid pays for 43

percent of the total long term care expenditures in the United States. *Medicaid Matters*, *supra*, at 2-3.

Over its forty-six year history, Medicaid has played a pivotal role in arranging for and funding health services. The program has resulted in numerous successes. It has reduced the numbers of uninsured, helped provide near-universal protection against communicable childhood diseases, played a major role in reducing infant mortality rates, and provided a critical life line to individuals with chronic and disabling conditions. *See* Schneider et al., *supra*, at 2; *Medicaid Matters*, *supra*, at 1-2. Medicaid is a cornerstone of the nation's health care system.

Medicaid is an entitlement program. Accordingly, "all individuals" who meet the eligibility requirements are entitled to receive a federally established set of benefits with "reasonable promptness." *See* 42 U.S.C. § 1396a(a)(10)(A), 42 U.S.C. § 1396a(a)(8). *See Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981) ("An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives."). The federal and participating state governments have a legal obligation to pay for and administer medical assistance needed by program beneficiaries in compliance with the requirements of the Medicaid Act and implementing regulations. *Id.* Thus, Medicaid coverage responds as emerging populations and economic needs arise, including rising unemployment, loss of private health care coverage, disasters, increasing disability rates, and an aging

society. *See Medicaid Matters, supra*, at 1-2; Schneider et al., *supra*, at 2.

Entitlement to Medicaid triggers legal rights, including the right to enforce certain statutory requirements that are placed on the states. It is this entitlement that makes Medicaid insurance and that assures individuals that coverage will be there when care is needed. Since the beginning of the Medicaid program, beneficiaries have been able to make their entitlement real by bringing *Ex parte Young* actions for prospective injunctive relief against state officials who are engaged in ongoing violations of federal law. Since the beginning of the Medicaid program, these cases have been based not only on 42 U.S.C. § 1983 but also on the Supremacy Clause. It is the Supremacy Clause that is at issue in this case.[2]

---

[2] Section 1983 is not at issue here. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), clarified that private enforcement under § 1983 is limited to federal statutory provisions that reflect unambiguous congressional intent to benefit the individual plaintiffs. The enforcement test is well-established. Thirty-two Medicaid cases have been decided in the circuit courts of appeals since *Gonzaga*, with no splits among the circuits. *See* National Health Law Program, *Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983* (June 2011), http://www.healthlaw.org. Unlike other appellate courts, *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), allowed enforcement of 42 U.S.C. § 1396a(a)(30)(A). However, that decision was vacated by *Selig v. Pediatric Specialty Care*, 551 U.S. 142 (2007).

II. California's Across-The-Board Medicaid Rate Cuts Are Incompatible With And Effectively Nullify The Equal Access Provision Of The Social Security Act.

When providers leave Medicaid programs due to inadequate payment rates, Medicaid patients experience problems locating alternative, appropriate care and are harmed. The U.S. Department of Health and Human Services recently proposed regulations that recognize that states' long running, budget-driven failures to comply with 42 U.S.C. § 1396a(a)(30)(A) are causing Medicaid recipients to be denied sufficient access to covered care and services. *See* 76 Fed. Reg. 26342, 26343 (May 6, 2011). And, several courts, looking at the issue both before and after *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), have noted this national problem. *See, e.g.*, *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 701 n.5 (5th Cir. 2007) (denying Medicaid recipients relief under § 1983 after discussing six such cases); *see also id.* (taking judicial notice of the Texas' Medicaid agency's statement that "[r]ate increases for physicians would promote access to care for Medicaid clients that would likely erode without the increase").[3]

Even before California enacted the cutbacks, its Medicaid provider payments were the forty-

---

[3] *See, e.g.*, David L. Skaggs et al., *Access to Orthopedic Care for Children With Medicaid Versus Private Insurance: Results of a National Survey*, 26 J. Ped. Orthopaedics 400 (2006).

seventh *lowest* in the nation.[4] Access to office-based physicians in California is so limited that some recipients languish months before getting an appointment for treatment.[5] Patients of facilities with average wait times of 31 days or longer face significantly higher odds of dying than patients who were treated at medical facilities with shorter wait times.[6]

Participation in Medi-Cal among medical and surgical specialists is even lower than participation by primary care physicians because few doctors are willing to treat Medi-Cal patients because reimbursement rates are insufficient to cover the

---

[4] Stephen Zuckerman, Amy Williams & Karen Stockley, Cal. HealthCare Found., *Medi-Cal Physician and Dentist Fees: A Comparison to Other Medicaid Programs and Medicare* 23 (Apr. 2009), http://www.chcf.org/~/media/MEDIA%20LIBRARY%20Files/PDF/M/PDF%20MediCalFeeComparison.pdf.

[5] *See* Evan Halper, *Further Fee Cuts Force a Medi-Cal Exodus: Doctors are Rejecting New Patients*, L.A. Times, Mar. 24, 2008, 2008 WLNR 5628983; Duane W. Gang, *Riverside County Threatens to Pull Out of Medi-Cal Mental Health Program*, The Press Enterprise (Riverside, Cal.), Apr. 1, 2008, http://www.pe.com/localnews/healthcare/stories/PE_News_Local_H_board02.430192d.html.

[6] *E.g.* Julia C. Prentice & Steven D. Pizer, *Delayed Access to Health Care and Mortality*, 42 Health Services Res. 644-62 (2007); *cf.* Joanna Bisgaier & Karin V. Rhodes, *Auditing Access to Specialty Care for Children with Public Insurance*, 364 N. Eng. J. Med. 2324 (Jun. 16, 2011) (finding Medicaid recipients in Illinois wait 22 days longer than the privately insured for an appointment).

costs of treatment.[7] Pediatric surgeons, gynecologists and obstetricians, otolaryngologists, mental health professionals, and dentists have all reported that the actual cost of providing care is well above what Medi-Cal reimburses for their service.[8] Medi-Cal reimbursement rates have not significantly increased since 2001; in fact, California's rates increased only two percent from 2003 to 2008, over seven times less than the national average and ten times less than the rate of inflation over the same period.[9]

---

[7] *See, e.g.*, Edward C. Wang et al., *Inequality of Access to Surgical Specialty Health Care: Why Children With Government-Funded Insurance Have Less Access Than Those with Private Insurance in Southern California*, 114 Pediatrics 584 (2004) (concluding 97 out of 100 surveyed otolaryngologists would offer an appointment to a privately insured child as compared to 27 for a child on Medi-Cal, with low monetary reimbursement given as chief reason for refusal).

[8] *See* David L. Skaggs et al., *Access to Orthopedic Care for Children with Medicaid Versus Private Insurance in California*, 107 Pediatrics 1405, 1406 (2001) (finding that cost of treatment by pediatric orthopedic surgeon exceeded Medi-Cal reimbursement); *Clayworth v. Bonta*, 295 F. Supp. 2d 1110, 1116 n.5 (E.D. Cal. 2003) (finding Medi-Cal reimbursement rates for OB/GYN services set below provider costs), *rev'd on other grounds* 140 Fed. App'x 677 (9th Cir. 2005); Halper, *supra* note 5 (reporting Medi-Cal reimbursement for tonsillectomies is insufficient to cover surgical costs); Wang, *supra* note 8 (finding Medi-Cal funds for mental health treatment do not cover costs); Martin Espinoza, *Dental Care Called a Health Care Crisis*, Press Democrat (Santa Rosa, Cal.), June 16, 2011, http://www.pressdemocrat.com/article/20110616/ARTICLES/110619585?p=all&tc=pgall (noting low dental participation because "it costs more to bill for Denti-Cal than what you get").

[9] Zuckerman, Williams & Stockley, *supra* note 4, at 11.

Since Medicaid recipients are in significantly poorer health than the general population, the consequences they face from reduced access to care leave them in a dire situation.[10] Lack of access to preventive care or treatment is the third leading cause of death for adults age 55-64, behind heart disease and cancer and the sixth-leading cause of death among adults ages 25 to 64, ahead of HIV/AIDS and diabetes.[11] Low Medi-Cal provider participation results in significantly worse and even grave health outcomes for recipients.

---

[10] *See* Jack Hadley, Kaiser Comm'n on Medicaid and the Uninsured, *Sicker and Poorer: The Consequences of Being Uninsured* 46 (2002), http://www.kff.org/uninsured/upload/Full-Report.pdf.

[11] *See* Stan Dorn, Urban Inst., *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* 4 (2008), http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf; Karen Davis, Testimony before U.S. Senate, Special Comm. on Aging, The Commonwealth Fund, Time for Change: The Hidden Cost of a Fragmented Health Insurance System 2 (2003), http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=221616.

III. The Supreme Court Has Consistently Recognized That Program Beneficiaries Can Enjoin State Laws That Are Invalid Under The Supremacy Clause, And Congress Has Recognized This Right.

On numerous occasions dating from the early 1970s, the Supreme Court has held that beneficiaries of Social Security Act programs can bring preemption actions to enjoin state laws that conflict with federal law and are, thus, "invalid under the Supremacy Clause." *Townsend v. Swank*, 404 U.S. 282, 285 (1971). In *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curium), the Court held that a state statute that conflicted with the Social Security Act was preempted by operation of the Supremacy Clause. The Court noted that the Social Security Act "unambiguously rules out any attempt to attach Social Security benefits," while the Arkansas statute at issue in the case "just as unambiguously allows the State to attach those benefits." *Id.* at 397. The Court held that "this amounts to a 'conflict' under the Supremacy Clause—a conflict the State cannot win." *Id. See Blum v. Bacon*, 457 U.S. 132, 138 (1982) (holding state welfare regulations that conflicted with regulations promulgated pursuant to the Social Security Act "are invalid under the Supremacy Clause"); *N.Y. State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 423 n.29 (1973) (applying preemption analysis but finding no inconsistency, noting that "[c]onflicts [in Social Security Act programs], to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely

trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control."); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972) (holding that a California regulation excluding a parent's absence because of military service from the definition of "continued absence" from home conflicted with Social Security Act AFDC eligibility provisions and was invalid under the Supremacy Clause); *see also Ark. Dept. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (assuming preemption cause of action without discussion). *See also PhRMA v. Walsh*, 538 U.S. 644 (2003) (plurality opinion) (deciding merits of preemption claim brought by provider organization); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 478 (1996) (applying Supremacy Clause in provider case and remanding for entry of injunction to extent state constitution conflicted with Medicaid Act). [12]

---

[12] The petitioner and his *amici* voice concern that a litigation floodgate will be produced if plaintiffs are able to enjoin state laws that are invalid under the Supremacy Clause. However, in a line of cases dating back more than 30 years, each of the circuit courts of appeals already used Supremacy Clause analysis to determine the validity of state Medicaid laws without dire consequences coming to pass. *See, e.g., PhRMA v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) (considering whether state statute conflicted with Medicaid so as to be invalid under Supremacy Clause); *Concourse Rehab. & Nursing Ctr., Inc. v. Whalen*, 249 F.3d 136, 146 (2d Cir. 2001); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 178 (3d Cir. 1995 ("The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law ... and compels compliance by participants in Title XIX federal aid programs with federal law and regulations."); *Randall v. Lukhard*, 729 F.2d 966 (4th Cir. 1984) (en banc)

In 1994, Congress twice amended the Social Security Act to make clear that private causes of action are available. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. Those amendments overruled parts of *Suter v. Artist M.*, 503 U.S. 347 (1992). They also affirmed the clear understanding of Congress that program beneficiaries would maintain access to the courts on the grounds that were recognized by this

---

(adopting holding from *Randall v. Lukhard*, 709 F.2d 257, that a Virginia rule was invalid because it conflicted with a provision of the Medicaid Act); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005) ("[I]t is well-established that the federal courts have jurisdiction under 28 U.S.C. § 1331 over a preemption claim seeking injunctive and declaratory relief."); *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (because Michigan law "conflicts with the program requirements of Medicaid, it must be held invalid under the Supremacy Clause"); *Zbaraz v. Quern*, 596 F.2d 196, 202 (7th Cir. 1979) (remanding with instructions to enjoin enforcement of state law to extent it conflicted with Medicaid); *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (granting recipients' request to enjoin Medicaid service cutback, holding "preemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when state law conflicts with a federal statute or regulation."); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985) (applying "settled proposition that state regulations which are inconsistent with federal [Medicaid] law are invalid under the Supremacy Clause"); *Hern v. Beye*, 57 F.3d 906, 906 (10th Cir. 1995) (affirming injunction prohibiting enforcement of state law "to the extent it conflicts with federal Medicaid law"); *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 663-64 (D.C. Cir. 1983) ("It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.").

Court prior to 1992, the year *Suter* was decided. *See* H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2901, 3257 ("The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandate of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent that they were able to prior to the decision in *Suter v. Artist M.*"). Sections 1320a-2 and 1320a-10 clearly mean that Congress intends preemption actions under the Supremacy Clause to live on as a means of preventing state officials from acting contrary to the requirements of the Social Security Act.

IV. The Medicaid Act's Statutory Scheme Is Not Inconsistent With The Need For Private Enforcement Of The Supremacy Clause To Prevent State Medicaid Officials From Acting Contrary To Federal Law.

In its brief supporting the petitioner, the United States argues that allowing Medicaid recipients and providers access to the courts is inconsistent with Medicaid's "statutory scheme" vesting enforcement authority in the Department of Health and Humans Services (DHHS). Brief for the United States as *Amicus Curiae* Supporting Petitioner at *10, *Douglas v. Indep. Living Ctr. of S. Cal. et al.* (May 2011) (Nos. 09-958, 09-1158, and 10-283) [hereinafter U.S. Indep. Living Ctr. Brief 2011]. This argument is inconsistent with Supreme Court precedent and the expressed opinion of Congress,

ignores DHHS's limited enforcement authority, and contradicts the position the United States has taken in other cases.

A statutory enforcement scheme either substitutes for private enforcement or it does not. In *Wilder*, this Court has held that the Medicaid Act does not contain a statutory scheme that would replace private enforcement. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990); *see generally City of Rancho Palo Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (listing Medicaid as a statute whose private judicial enforcement is not foreclosed based on a statutory enforcement scheme). When Congress amended the Social Security Act in 1994, it expressed its intent that private enforcement of the Social Security Act be determined according to the grounds applied in this Court's decisions prior to 1992. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. Thus, the grounds established in *Wilder*, decided in 1990, are included in those grounds Congress approved in its 1994 amendments to the Social Security Act.

To be sure, Medicaid's statutory scheme does include a provision authorizing the Secretary of DHHS to enforce federal Medicaid law: 42 U.S.C. § 1396c authorizes the Secretary to terminate federal funding to states whose plans are not in compliance with the Act. Termination of federal funding is a draconian remedy, one that DHHS rarely uses. As noted by the United States when it opposed certiorari in these cases, "[P]rograms in which the drastic measure of withholding all or a major portion of federal funding if the only available remedy would

be generally less effective than a system that also permits awards of injunctive relief in private actions." Brief for the United States as *Amicus Curiae* at *19, *Maxwell-Jolly v. Indep. Living Ctr. of S. Cal.*, 572 F.3d 644 (9th Cir. 2009) on petition for cert December 2010 [hereinafter U.S. Indep. Living Ctr. Brief Dec. 2010].[13] *See also Va. Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1639 n. 3 (2011) ("The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." (citation omitted)).

---

[13] The United States cites a regulation recently proposed by DHHS as evidence that DHHS is "committed to ensuring that" Medicaid beneficiaries have meaningful access to covered services. U.S. Indep. Living Ctr. Brief 2011 at *11-12 (citing Medicaid Program; Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26342 (May 6, 2011). Regardless of DHHS's alleged commitment, the proposed regulations do not contain an enforcement scheme that would render the need for private enforcement unnecessary. And while issuance of final regulations will hopefully provide guidance that states will follow, thereby decreasing their noncompliance with the statutory requirement of rates sufficient to assure equal access, these proposed regulations do not remove the necessity of private enforcement in situations where recalcitrant states continue to ignore the statutory mandate.

Despite the position taken here, the United States elsewhere recognizes that private enforcement complements the Secretary's oversight. For example, the United States is supporting private enforcement in a pending Medicaid case. In May 2011, Indiana enacted a statute that bars certain entities that perform abortions from participating in Medicaid. Medicaid-participating providers who were barred from providing services and Medicaid recipients who lost access to care filed suit in federal court arguing that the state law is preempted by a specific Medicaid Act provision and that they have a federal right to enforce that provision pursuant to 42 U.S.C. § 1983. The United States filed an amicus brief urging the court to enjoin implementation of the Indiana law. *See Statement of Interest of the United States at *21-22, Planned Parenthood of Indiana, Inc.* v. *Commissioner of the Ind. State Dept. of Health*, June 16, 2011 (S.D. Ind. No. 1:11-cv-00630-TWP-DKL) [hereinafter U.S. Planned Parenthood Brief]. According to the United States, the recipients' and providers' request for injunctive relief was "particularly necessary" because "Indiana has expressed its view that operating a 'non-compliant program' is a 'lawful option for the State under the [Medicaid] statute,' so long as the State is willing to 'risk that the Secretary will turn off the funding spigot.'" *Id.* at *21-22; *see also, e.g.*, Statement of Interest of the United States of America, *John B. v. Emkes*, Feb. 18, 2011 (M.D. Tenn. No. 3-98-0168) (asking court to deny Tennessee's request to terminate a consent decree because the Medicaid child health screening and treatment provisions are privately enforceable by

Medicaid recipients); Brief for the United States as Amicus Curiae Supporting Respondents at *30, *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441) (arguing that private enforcement is "an important complement to the Secretary's necessarily macroscopic oversight of the State, by assuring that States carry out the specific duties" of the Social Security Act and arguing that federal-state cooperative program of the Social Security Act does not contain statutory scheme that precludes private enforcement); U.S. Indep. Living Ctr. Brief Dec. 2010 at *19 (arguing against certiorari in these cases, pointing out that application of a contract analogy "overlooks the important role private parties can and often do play in vindicating federal law. A system that relies solely on agency review may be less effective than a system of agency review supplemented by private enforcement"). *Cf. Chisholm v. Hood*, 110 F. Supp. 2d 499 (E.D. La. 2000) (ordering State to cover physical and related therapy services for Medicaid eligible children six years after CMS had informed the State that the Act required coverage of these services).

Nor do the private parties have another adequate remedy, despite some suggestions to the contrary. *See PhRMA*, 538 U.S. at 675 (Scalia, J., concurring). In *PhRMA*, Justice Scalia suggested that the plaintiffs only remedy for a violation of the Medicaid Act is to ask the Secretary of DHHS to terminate federal funding and thereafter file an Administrative Procedural Act action if they are dissatisfied with the outcome. *Id.* at 675 (citing 5 U.S.C. § 706(2)(A)). There is no such statutory

scheme, *see* 42 U.S.C. § 1316 (citing § 1396c), nor is there such an administrative scheme for Medicaid recipients or providers. The federal Medicaid regulations allow a State to obtain administrative and judicial review when it is dissatisfied with the denial of a state plan amendment or federal withhold of funding. *See* 42 C.F.R. §§ 430.30-430.104. Only CMS and the State are automatic parties to the administrative hearing, *id.* at § 430.76, and only the State has a right to judicial review, *id.* at § 430.38. The regulations permit individuals to petition the federal agency for permission to participate in the hearing, but participation is within the discretion of the presiding officer at the hearing. *Id.* § 430.76. The ability of a recipient or provider to seek permission to participate in a State's hearing before the Department is not a statutory scheme that displaces private enforcement. *See Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (refusing to attach significance to the fact that HEW (predecessor to DHHS) was engaged in a study of the issues before the court or to impose an "exhaustion of administrative remedies" requirement, noting that under the regulations recipients could not "have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs."); *Almenzares v. Wyman*, 453 F.2d 1075, 1087 (2d Cir. 1971) (finding administrative petition scheme inadequate because of the "inability of welfare recipients to trigger such a proceeding, along with the natural reluctance of HEW to embark on a course that could lead to withdrawal of federal aid"); *Ariz. Dep't of Pub. Welf. v. Dep't of Health,*

Educ. & Welf., 449 F.2d 456. 464, n.9 (9th Cir. 1971) (finding courts without jurisdiction to hear petitions from welfare recipients because § 1361 limits review to petitions from states and suggesting recipients bring direct declaratory action in district court finding such a remedy "preferable to a judgment ordering the cessation of the flow of federal [welfare] funds"). *See also Wilder*, 496 U.S. at 514 n.12 (acknowledging position of United States that there is no remedy under the APA because the decision to accept a states' assurance is entrusted to agency discretion); *id.* at 521-22 (rejecting argument that an action against the Secretary under the APA forecloses private enforcement).

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Court to affirm the judgment of the Circuit Court.

August 5, 2011

Respectfully submitted,

Jane Perkins
(*Counsel of Record*)
National Health Law Program
101 E. Weaver Street,
Suite G-7
Carrboro, NC 27510
perkins@healthlaw.org
(919) 968-6308

Stacy Canan
AARP Foundation Litigation
Michael Schuster
AARP
601 E Street, NW
Washington, DC 20049
scanan@aarp.org
(202) 434-2060

Byron J. Gross
National Health Law Program
3701 Wilshire Blvd., Suite 750
Los Angeles, Ca 90010
gross@healthlaw.org
(310) 204-6010

Barbara Jones
AARP Foundation Litigation
200 S. Los Robles, Suite 400
Pasadena, CA 91101
BJones@aarp.org
(626) 585-2628

Counsel for amici curiae

RECORD
AND

Nos. 09-958, 09-1158, 10-288

IN THE
Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASEIN WOODWARD
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Library of Congress
Law Library

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
FOUNDATION
125 Broad Street
New York, NY 10025

VICTOR VIRAMONTES
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014

JOHN PAYTON
DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013

JOSHUA CIVIN
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
1444 I Street, N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURTS' LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES 4

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions 5

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions 11

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions 14

II. PRECLUDING DIRECT RIGHTS OF ACTION UNDER THE SUPREMACY CLAUSE WOULD HAVE BROAD AND HARMFUL CONSEQUENCES FOR MAINTAINING THE SUPREMACY OF FEDERAL LAW 22

A. Minorities, Immigrants, and Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws 23

TABLE OF CONTENTS—Continued

Page

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Allen v. *Baltimore & Ohio Railroad Co* 114 U.S. 311 (1884) 12

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 12

Arkansas Department of Health & Human Services v. *Ahlborn*, 547 U.S. 268 (2006)..... 15, 16, 29

Asakura v. *City of Seattle*, 265 U.S. 332 (1924) 16

Bell v. *Hood*, 327 U.S. 678 (1946) 9

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 10

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 2, 6, 7

Bond v. *United States*, 131 S. Ct. 2355 (2011) 5, 14

Brown v. *Board of Education*, 347 U.S. 483 (1954) 7

Buquer v. *City of Indianapolis*, No. 11-cv-708, 2011 WL 2532935 (S.D. Ind. June 24, 2011) 24

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 28

Carlson v. *Green*, 446 U.S. 14 (1980) 10

Chamber of Commerce v. *Edmundson*, 594 F.3d 742 (10th Cir. 2010) 23

Chamber of Commerce v. *Whiting*, 131 S. Ct. 1968 (2011) 23

Chambers v. *Florida*, 309 U.S. 227 (1940) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Chicago Burlington & Quincy Railroad Co. v. *City of Chicago*, 166 U.S. 226 (1897) 12

Comacho v. *Texas Workforce Commission*, 408 F.3d 229 (5th Cir. 2005) 25

Correctional Services Corp. v. *Malesko*, 534 U.S. 61 (2001) 10

Crosby v. *City of Gastonia*, 635 F.3d 634 (4th Cir. 2011) 12

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 16, 18, 20

Cuomo v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) 16

Dennis v. *Higgins*, 498 U.S. 439 (1991) 12

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 6

Ex Parte Young, 209 U.S. 123 (1908) 12, 13, 15

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 16

Foster v. *Love*, 522 U.S. 67 (1997) 16

Free Enterprise Fund v. *Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010) 14

Georgia Latino Alliance for Human Rights v. *Deal*, No. 11-cv-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011) 24

Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 17

Green v. *Mansour*, 474 U.S. 64 (1985) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Guinn v. *United States*, 238 U.S. 347 (1915) 8

Hays v. *Port of Seattle*, 251 U.S. 233 (1920) 12

Haywood v. *Drown*, 129 S. Ct. 2108 (2009) 21

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 16, 20, 30

Howlett ex rel. Howlett v. *Rose*, 496 U.S. 356 (1990) 21

Kemp v. *Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010) 24, 25

Lankford v. *Sherman*, 451 F.3d 496 (8th Cir. 2006) 25

League of United Latin American Citizens v. *Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) 24

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 16

Maine v. *Thiboutot*, 448 U.S. 1 (1980) 16

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 4, 5

McLaurin v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950) 7

Monroe v. *Pape*, 365 U.S. 167 (1961) 6

New York v. *United States*, 505 U.S. 144 (1992) 14

Osborn v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) 11, 15

Patsy v. *Board of Regents of Florida*, 457 U.S. 496 (1982) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Pharmaceutical Research & Manufacturers of America v. *Walsh*, 538 U.S. 644 (2003) 15, 16, 19, 26

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 2, 9

Printz v. *United States*, 521 U.S. 898 (1997) 14

Raich v. *Truax*, 219 F. 273 (D. Ariz. 1915) 11

Rowe v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) 16

Scott v. *Donald*, 165 U.S. 107 (1897) 12

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 16

Society of Sisters v. *Pierce*, 296 F. 928 (D. Or. 1924) 9

South Carolina v. *Baker*, 485 U.S. 505 (1988) 14

South Dakota v. *Dole*, 483 U.S. 203 (1987) 14

Terrace v. *Thompson*, 263 U.S. 197 (1923) 8, 9

Terry v. *Adams*, 345 U.S. 461 (1953) 2, 8

Testa v. *Katt*, 330 U.S. 386 (1947) 21

Toll v. *Moreno*, 458 U.S. 1 (1982) 30

Truax v. *Raich*, 239 U.S. 33 (1915) 2, 8

United States v. *City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980) 29

United States v. *Locke*, 529 U.S. 89 (2000) 16

Vicksburg Waterworks Co. v. *Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) 12, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Villas at Parkside Partners v. *City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) 24

Villas at Parkside Partners v. *City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) 24

Watters v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) 16

Webster v. *Doe*, 486 U.S. 592 (1988) 5

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 14

DOCKETED CASES

Complaint, *United States* v. *Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) 18

Complaint, *United States* v. *Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) 18

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const.
art. I, § 8, cl. 1 ..... 15, 22, 23, 26
art. I, § 8, cl. 3 ..... 3, 12, 13, 19, 20
art. I, § 10, cl. 1 ..... 2, 11, 12, 19
art. II, § 2, cl. 2 14
art. III 29
art. VI, cl. 2 ..... *passim*
amend. I 19
amend. V 6
amend. XI 13
amend. XIV 8, 9, 11, 12, 13, 19, 29
amend. XV 8, 19

42 U.S.C. § 1983 ..... *passim*

Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 6

OTHER AUTHORITIES

Bandes, Susan, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289 (1995) 7

Berzon, Honorable Marsha S., *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681 (2009) 7

Blackmun, Harry A., *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1 (1985) 7

TABLE OF AUTHORITIES—Continued

Page(s)

The Federalist Papers
No. 33 (Hamilton) 14
No. 78 (Hamilton) 5

Hart & Wechsler's The Federal Courts & The Federal System (Fallon, Richard H. et al. eds., 6th ed. 2009) 16

Hills, Roderick M., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201 (1999) 28

Key, Lisa E., *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283 (1996) 27

Mank, Bradford C., *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 Hous. L. Rev. 1417 (2003) 27

Perkins, Jane, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7 (2002) 27

Sloss, David, *Constitutional Remedies For Statutory Actions*, 89 Iowa L. Rev. 355 (2004) 16, 20, 29

Smolla, Rodney A., *Federal Civil Rights Acts* (3d ed. 2011) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Stephenson, Matthew C., *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93 (2005) 29

Wright, Charles Alan et al., *Federal Practice and Procedure* (3d ed. 2008) 13

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended civil liberties for over ninety years, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has appeared before this Court in numerous civil rights cases, both as direct counsel and as amicus curiae.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization established to assist African Americans and other people of color in securing their civil and constitutional rights. For more than six decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the Supreme Court and other federal courts on matters of race discrimination, including through the type of direct constitutional enforcement actions at issue in this case.

The Mexican American Legal Defense and Education Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is

---

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), written consents to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in the federal courts throughout the nation, including the Supreme Court. MALDEF's mission includes a commitment to protect the rights of immigrant Latinos in the United States, and MALDEF has asserted preemption theories in federal court to further this commitment.

SUMMARY OF ARGUMENT

I. Enforcement of the Constitution is not dependent on affirmative action by the political branches of government. Rather, from this Nation's earliest times to the present, the federal courts have consistently exercised their equitable powers to compel compliance with the Constitution, without suggesting the necessity for a statutory vehicle, such as 42 U.S.C. § 1983, for such authority. Those equitable powers have been, and continue to be, particularly important for minorities, immigrants, low-income individuals, and others whom our majoritarian political processes are often unwilling or unable to protect against constitutional violations. Indeed, direct actions brought to enforce compliance with the Constitution have resulted in many of this Court's most important civil-rights and civil-liberties decisions, including *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), *Terry* v. *Adams*, 345 U.S. 461 (1953), *Truax* v. *Raich*, 239 U.S. 33 (1915), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); in none of those cases did the Court suggest that it was acting under § 1983 or another statutory vehicle. That history is consistent with the many cases in which this Court enforced other provisions of the Constitution, such as the Contracts Clause and Commerce Clause, as well as structural principles of federalism and separation of powers.

Such direct actions are also available to enforce a claim of preemption under the Supremacy Clause, *see* U.S. Cert. Amicus Br. 15-18, including where the preemption is based on a statute enacted under Congress's spending power. This Court has entertained and sustained many preemption claims in that context, recognizing the appropriateness of direct actions to vindicate the supremacy of federal law. Petitioner suggests that such direct actions should not be allowed, or drastically restricted to narrow contexts, but that rule would seriously undermine federal law. In many contexts, a direct action is the only way in which the supremacy of federal law could be established. Requiring litigants asserting a Supremacy Clause claim to wait for a state-court action would be grossly inefficient and could result in federal law being undermined by invalid state laws.

II. Direct actions remain critical to vindicate the supremacy of federal law. This is especially true for racial minorities, immigrants, and low-income individuals, who in many circumstances have difficulty obtaining access to, or support from, the federal political branches, and who often depend on a judicial remedy to prevent enforcement of state laws that conflict with federal laws. In contexts as diverse as immigration, housing, and public assistance, direct actions remain the only effective avenue to ensure the supremacy of federal law. Eliminating that avenue would seriously undermine federal law, because other avenues of enforcement of federal law—such as termination of federal funding or enforcement actions brought by the United States—are highly impractical and offer little or no hope for successful enforcement on behalf of individuals directly harmed by states' illegal conduct. Absent direct actions brought to establish the supremacy

of federal law by those most directly affected by pre-empted state laws, there could well be no meaningful remedy for state noncompliance with the Constitution's fundamental safeguards.

ARGUMENT

I. THE COURTS' LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES

This Court has long recognized that the strictures of the Constitution may be enforced through direct actions for equitable relief, regardless whether Congress has enacted legislation specifically establishing a cause of action for such relief. So long as the court has subject-matter jurisdiction over the claim, separate legislation establishing a cause of action has never been necessary for a plaintiff to obtain forward-looking relief from unconstitutional conduct. Rather, the traditional equitable authority of the courts has always been deemed sufficient to provide such a remedy. The Court has adhered to this principle in many contexts—whether the constitutional claim was brought against federal, state, or local officials; whether the claim was brought to enforce individual constitutional rights or to enforce structural principles in the Constitution; and whether or not the claim was brought to preclude an anticipated enforcement action.

The courts' inherent equitable authority to compel compliance with the Constitution is implicit in the structure of the Constitution itself, and in the Constitution's status as the supreme law of the land. *See* Santa Rosa Br. 13-18. As the Court recognized in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), judicial review is necessary as a check against the aggrandizement of

power by the political branches. These structural principles not only protect each branch from intrusion by the others, but they also protect individuals from the abuse of governmental power. *See Bond* v. *United States*, 131 S. Ct. 2355, 2363-2364 (2011). Thus, as Chief Justice Marshall explained, "[t]he very essence of civil liberty" is "the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163. Although legislation may channel the way in which constitutional claims are entertained by the courts, the courts have long understood that the right to compel compliance with the Constitution is not contingent on the assent of the political branches. *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (stressing that a "'serious constitutional question'" would arise if the political branches attempted to preclude any judicial forum for constitutional claims by failing to make statutory allowance for such claims); *see also* Federalist No. 78 (Hamilton) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority.").

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions

The ability to enforce rights directly under the Constitution has been particularly important for minorities, immigrants, low-income individuals, and other persons who have faced systemic barriers in our majoritarian political process and thus have often depended on the federal courts to secure their rights when Congress and the Executive Branch have been

unable or unwilling to do so.[2] Some of this Court's (and this country's) most significant steps toward achieving equality and liberty have resulted from plaintiffs' enforcement of their rights directly under the Constitution. And that was particularly true in the long period before this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), revived 42 U.S.C. § 1983 as a vehicle for enforcement of constitutional rights.

Many landmark civil rights decisions resulted from direct actions to enforce the Constitution. One such case, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), is a keystone of this Court's desegregation precedent. The *Bolling* plaintiffs challenged racial segregation in the public schools of the District of Columbia under the Due Process Clause of the Fifth Amendment. The Court ruled unanimously for the plaintiffs, holding that racial segregation in the District's public schools violated the Fifth Amendment. The Court nowhere suggested that the plaintiffs' ability to be heard on their due process claim depended on their being able to point to a statutory cause of action, such as § 1983.[3]

---

[2] *See Chambers* v. *Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[3] Indeed, at the time, it was an open question whether § 1983 applied to the District of Columbia. The Court did not address the question until *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), which held that § 1983 did not apply to persons acting under color of D.C. law. Congress later amended § 1983 to apply to such persons. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284.

Desegregation in higher education was advanced through another direct constitutional action, *McLaurin* v. *Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). After the University of Oklahoma denied the plaintiff admission to graduate school on the basis of his race, McLaurin sued for injunctive relief, alleging that the state law prohibiting integrated schools deprived him of equal protection. The district court agreed. The Oklahoma legislature then amended the statute, allowing the university to admit the plaintiff but restricting him to segregated facilities. The plaintiff returned to the district court to seek injunctive relief, which the district court denied. The Supreme Court reversed, holding that the amended state law permitting segregated facilities deprived McLaurin of his right to equal protection. *Id.* at 642. The Court nowhere suggested that McLaurin's ability to bring his constitutional claim depended on a statutory cause of action.[4]

---

[4] Another landmark desegregation case, *Brown* v. *Board of Education*, 347 U.S. 483 (1954)—which also did not mention the predecessor statute to § 1983—can be seen as a direct constitutional action as well, although commentators disagree on how to characterize that case. *Compare* Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 685-686 (2009) (characterizing *Brown* as a direct constitutional action) *and* Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 355 (1995) (same), *with* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 1-2, 19 (1985) (characterizing *Brown* as a § 1983 suit) *and* Smolla, *Federal Civil Rights Acts* § 14:2, at 391-392 (3d ed. 2011) (same). Regardless, *Bolling* demonstrates that there is a direct right of action under the Constitution to challenge the legality of racial segregation in public schools.

In an equally important decision for minority voting rights, the Court in *Terry* v. *Adams*, 345 U.S. 461 (1953), sustained a constitutional challenge by black citizens to one of a series of schemes to maintain whites-only primary elections in Texas. Having abandoned their claim for damages, the *Terry* plaintiffs rested their equitable claims directly on the Fourteenth and Fifteenth Amendments. *Id.* at 478 nn.2 & 3 (Clark, J. concurring). The Court struck down the discriminatory primary as unconstitutional. *Id.* at 470; *see also id.* at 467 n.2 (plurality opinion) (noting that the Fifteenth Amendment is "'self-executing'"). In so ruling, the Court relied on its earlier decision in *Guinn* v. *United States*, 238 U.S. 347 (1915), which invalidated grandfather clauses under the Fifteenth Amendment, even though Congress had not enacted specific legislation reaching primary elections, based on "the self-executing power of the 15th Amendment," *id.* at 368.

Several of this Court's pathmarking decisions establishing the rights of noncitizens also reached the Court by way of direct action. For example, in *Truax* v. *Raich*, 239 U.S. 33 (1915), this Court held that an Arizona statute prohibiting the employment of noncitizens violated their rights to equal protection under the Fourteenth Amendment. The Court did not suggest the case was before it under a statutory cause of action such as § 1983, but rather stressed that the plaintiff had invoked the equitable power of the district court to restrain unconstitutional action. Similarly, in *Terrace* v. *Thompson*, 263 U.S. 197 (1923), the Court, although rejecting an immigrant's constitutional claim on the merits, stressed that the power to compel compliance with the Constitution rested on the courts' traditional equitable powers, noting that equity jurisdiction will be exercised to enjoin unconstitutional state laws "wherever

it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable." *Id.* at 214.

Similarly, one of this Court's leading decisions on the meaning of "liberty" within the Due Process Clause, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), arrived at the Court by way of a direct action brought to enforce the Fourteenth Amendment and to prevent Oregon officials from implementing a state compulsory education law that would have forced all children to attend public schools. *See id.* at 530. The Court nowhere referred to a statutory cause of action under which the claim for equitable relief was brought. The district court where the case was originally brought observed that "[t]he question as to equitable jurisdiction is a simple one, and it may be affirmed that, without controversy, the jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege, or immunity, threatened or active, to the detriment or injury of a complainant, *is inherent*, unless such party has a plain, speedy, and adequate remedy at law." *Society of Sisters* v. *Pierce*, 296 F. 928, 931 (D. Or. 1924) (emphasis added).

This theme—that the courts have inherent authority to restrain violations of the Constitution, so long as they have subject-matter jurisdiction—runs throughout the Court's decisions and has never been seriously questioned. In *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) (footnote omitted), the Court observed that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do"—without any mention of a statutory vehicle such as § 1983. And although Jus-

tices of this Court have debated whether *damages* should be available to remedy *past* constitutional violations in the absence of a statutory cause of action, *see Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), the Court has never questioned courts' inherent authority to enjoin threatened or ongoing constitutional violations. *See, e.g., Carlson* v. *Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (criticizing direct constitutional actions for damages, but acknowledging tradition of direct constitutional actions for equitable relief, and noting that "[t]he broad power of federal courts to grant equitable relief for constitutional violations has long been established").

Moreover, contrary to petitioner's assertion (Pet. Br. 43-44), the Court has entertained such direct actions to enforce the Constitution regardless whether that claim was brought to prevent a threatened enforcement action and might have been raised in defense to such an action. *See infra* pp. 18-22; U.S. Cert. Amicus Br. 17-18 (acknowledging that "not all of this Court's" preemption cases involved claims raised in defense to enforcement actions). Indeed, where the plaintiff could not bring the claim defensively to an enforcement action, the case for exercise of the courts' equity power is particularly compelling because the plaintiff could well have no other way to vindicate his constitutional rights. In the desegregation and voting rights cases discussed above, for example, there was no clear way that the plaintiffs seeking to vindicate their constitutional rights could have obtained a ruling on the merits of their claims except through affirmative litigation. And in *Truax*, the district court observed that the noncitizen's constitutional claim presented an appropriate

case for the exercise of equity power because under the challenged Arizona statute only employers, not (noncitizen) employees, were subject to criminal prosecution; thus the noncitizen employee would have had no other forum for his claim to be heard. *See Raich* v. *Truax*, 219 F. 273, 283-284 (D. Ariz. 1915). If a plaintiff seeking to enforce the Constitution has no other forum in which to raise his claim, that provides a stronger—not a weaker—rationale for the courts to entertain a direct equitable action.

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions

These civil rights cases are in keeping with historical tradition, in which this Court has long recognized direct actions to enforce constitutional provisions, regardless whether Congress has provided a specific statutory vehicle for enforcement of the Constitution.

One of the earliest examples is *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). This Court resolved the Bank of the United States' suit against the Ohio Auditor for collecting a state tax that conflicted with the federal statute that created the Bank. Although no statute created a cause of action for the Bank, this Court found that the dispute warranted the "interference of a Court," and it held the Ohio law unconstitutional on the ground that it was "repugnant to a law of the United States" and therefore void under the Supremacy Clause. *Id.* at 838, 868.

In the years after *Osborn*, and with increasing frequency after Congress provided for federal-question jurisdiction in 1875, courts routinely entertained suits to enforce directly a broad range of constitutional provisions, including the Contracts Clause, the Fourteenth

Amendment's Due Process Clause, and the dormant Commerce Clause. *See, e.g.*, *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920) (Due Process Clause and Contracts Clause); *Vicksburg Waterworks Co.* v. *Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) (Contracts Clause); *Chicago Burlington & Quincy R.R. Co.* v. *City of Chi.*, 166 U.S. 226 (1897) (Due Process Clause); *Scott* v. *Donald*, 165 U.S. 107 (1897) (Commerce Clause); *Allen* v. *Baltimore & Ohio R.R. Co.*, 114 U.S. 311 (1884) (Contracts Clause). Particularly noteworthy are the direct actions for equitable relief brought to enforce the Contracts Clause, because it still is not settled in this Court whether claims under the Contracts Clause may be brought under § 1983. *See Dennis* v. *Higgins*, 498 U.S. 439, 456-457 (1991) (Kennedy, J., dissenting); *Crosby* v. *City of Gastonia*, 635 F.3d 634, 640-641 (4th Cir. 2011) (noting issue), *petition for cert. filed*, No. 10-1479 (U.S. June 8, 2011). Nonetheless, the Court explained in *Vicksburg Waterworks* that the Contracts Clause claim was properly before it because "the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question"—without suggesting that a statutory cause of action was also necessary. 185 U.S. at 82. The Court more recently upheld a Contracts Clause claim in such a direct-action posture in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), without discussing whether the claim might have been brought under § 1983.

One of the most notable of these cases was *Ex Parte Young*, 209 U.S. 123 (1908). After the Minnesota Attorney General signaled his intention to enforce a state law limiting the rates that railroads could charge, a group of railroad shareholders sued him to enjoin en-

forcement of that law, arguing that it violated the Commerce Clause and Due Process Clause of the Fourteenth Amendment. The Court concluded that the Eleventh Amendment does not bar suits against state officers to enjoin violations of the Constitution or federal law. *Id.* at 159-160. The Court also concluded that the federal courts had jurisdiction because the case raised "Federal questions" directly under the Constitution. *Id.* at 143-145. The Court thus viewed the Constitution—paired with the federal-question jurisdiction statute—as providing the basis of the plaintiffs' right to sue a state officer to enjoin an alleged constitutional violation. As this Court has observed, "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). Indeed, scholars have concluded that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."[5]

Also demonstrating this principle are the numerous cases in which this Court has resolved structural constitutional claims brought against the federal government without suggesting that a statutory cause of action was necessary for those claims to be before the courts, and where there was no evident alternative forum for those claims to be heard (such as under the

---

[5] Wright et al., *Federal Practice and Procedure* § 3566, at 292 (3d ed. 2008).

Administrative Procedure Act or in defense to an enforcement action). *See Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992); *South Carolina* v. *Baker*, 485 U.S. 505 (1988); *South Dakota* v. *Dole*, 483 U.S. 203 (1987); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *see also Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 & n.2 (2010) (ruling that Appointments Clause claim was properly before the courts, despite the absence of a statutory cause of action).[6]

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions

Given the courts' historical willingness to entertain direct actions to enforce the Constitution, it would be surprising to learn that the Supremacy Clause, alone among the Constitution's provisions, could not be so enforced. As the Framers explained, the Supremacy Clause is fundamental to the Constitution, for if the laws of the United States "were not to be supreme," then "they would amount to nothing." Federalist No. 33 (Hamilton). The Supremacy Clause thus "flows immediately and necessarily from the institution of a federal government." *Id.*; *see also* Santa Rosa Br. 30-31. In keeping with historical tradition, direct actions under the Supremacy Clause have played an important

---

[6] In its most recent Term, this Court reiterated that it will entertain individuals' challenges based on federal structural constitutional principles. *See Bond*, 131 S. Ct. at 2363-2364 ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines."); *see also id.* at 2365 ("The structural principles secured by the separation of powers protect the individual as well.").

role in vindicating the supremacy of federal law, as *Osborn* and *Ex parte Young* illustrate.

This Court has implicitly recognized a right of action under the Supremacy Clause to enjoin preempted state law in many contexts—including cases where the preempting federal law was enacted pursuant to Congress's Spending Clause powers, and where state participation in the federal program was voluntary.[7] By routinely resolving such claims on the merits, without regard to whether a federal statute confers a right of action, this Court has established not only that federal courts have subject-matter jurisdiction over claims to enjoin preempted state law but that there is a right of action under the Supremacy Clause for such claims. *See* U.S. Cert. Amicus Br. 15-18 (recognizing that the Court has often decided preemption claims on their merits, implicitly assuming that a cause of action exists under the Supremacy Clause to challenge preempted state law). It is particularly noteworthy that the Court entertained such Supremacy Clause claims without ref-

---

[7] *See, e.g., Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006) (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds). In *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003) *("PhRMA")*, seven Justices (four in the plurality and three in dissent) reached and resolved the merits of plaintiff's claim that the challenged state law was preempted by the federal Medicaid statute. *See id.* at 649-670 (plurality opinion) (finding on the merits that state law was not preempted); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (finding on the merits that the state law was preempted). By so doing, seven Justices implicitly concluded both that the Court had the authority to resolve the case under federal-question jurisdiction and that the plaintiff had a claim to injunctive relief under the Supremacy Clause. *See id.* at 668 (plurality opinion).

erence to a statutory cause of action long before *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), established that § 1983 may be used to vindicate federal statutory—in addition to federal constitutional—rights against state interference. *See, e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924). That tradition continues unbroken to this day.[8]

In short, "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provi-

---

[8] *See, e.g.*, *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) (regulations promulgated under National Bank Act preempt enforcement of executive subpoenas from state Attorney General); *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Federal Aviation Administration Authorization Act preempts state requirements related to the transport of tobacco products); *Ahlborn*, 547 U.S. 268 (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (National Bank Act preempts state supervision of mortgage-lending activities by national bank affiliates); *PhRMA*, 538 U.S. at 649-670 (plurality opinion) (Medicaid Act did not preempt state prescription-drug rebate law); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act preempts state regulations on cigarette advertising); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000) (federal Burma statute preempts state statute barring state procurement from companies that do business with Burma); *United States* v. *Locke*, 529 U.S. 89 (2000) (various federal statutes preempt state regulations concerning, *inter alia*, the design and operation of oil tankers); *Foster* v. *Love*, 522 U.S. 67 (1997) (federal election statute preempts Louisiana's "open primary" statute); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preempts portions of state benefits law); *see also* Sloss, *Constitutional Remedies for Statutory Actions*, 89 Iowa L. Rev. 355, 365-400 (2004) (canvassing this Court's case law on preemption claims).

sion—and that such an action falls within federal question jurisdiction—is well established." *Hart & Wechsler's The Federal Courts & The Federal System* 807 (Fallon et al. eds., 6th ed. 2009) (collecting cases).

This Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is consistent with this analysis. That decision makes clear that § 1983 does not provide a home for all preemption claims (but may be used only to vindicate federal "rights"), *see id.* at 107, but it nowhere suggests that preemption claims may not be directly asserted merely because § 1983 does not provide a vehicle to do so. That the Supremacy Clause itself "does not create rights *enforceable under § 1983*," *id.* (emphasis added) means only that certain preemption claims may not be brought under § 1983, not that such claims may not be brought at all. Indeed, the dissent in *Golden State Transit*, which would have denied the award of money damages under § 1983, made that very point, explaining that denying relief under § 1983 "would not leave the company without a remedy" because "§ 1983 does not provide the exclusive relief that the federal courts have to offer," and that the plaintiffs could seek an injunction on preemption grounds. *Id.* at 119 (Kennedy, J., dissenting).[9]

---

[9] Section 1983 is not duplicative of the right of action for injunctive relief under the Supremacy Clause. By enacting § 1983, Congress expanded the kinds of state action that private litigants could challenge and the remedies they could seek beyond those available in suits directly under the Constitution. *See* Cal. Pharmacists Br. 35-39; Dominguez Br. 29-34; Santa Rosa Br. 27-28. That § 1983 has been an important mechanism to secure constitutional rights by providing damages remedies against state and local officials does not mean that § 1983 is the only avenue through which unconstitutional state action can be challenged.

Although petitioner and his amici have acknowledged that the federal courts have previously entertained direct actions to enforce the Constitution (including the Supremacy Clause), they have suggested that, where Congress has not provided a vehicle such as § 1983 for such claims to be entertained, then those claims should be remitted to state courts, under whatever procedures the States might have provided for them to be heard—or that, at most, the federal courts should entertain such direct actions only when they are brought to prevent the threatened imminent enforcement of an unconstitutional or preempted state law. *See* Pet. Br. 43-44; National Governors Ass'n et al. Amicus Br. 22-26; U.S. Merits Amicus Br. 19-22.[10] Those suggestions should be rejected for several reasons.

First, those arguments are inconsistent with this Court's uniform precedent. This Court has entertained and sustained many direct equitable actions under the Constitution, including the Supremacy Clause, and also including preemption claims based on a federal spending statute, even when there was no evident enforcement action to which the federal claim might be raised as a defense. For example, in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), the challenged

---

[10] The United States has taken the position elsewhere that the Supremacy Clause provides a direct cause of action that is not limited to asserting a defense to a state enforcement action. *See* Compl., *United States* v. *Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) (filed by the United States as plaintiff challenging Arizona immigration law, seeking declaratory and injunctive relief and asserting "Violation of the Supremacy Clause" as its first cause of action); Compl., *United States* v. *Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) (similar, in challenge to Alabama law).

Massachusetts law barred government procurement of goods and services from companies doing business with Burma. *See id.* at 366-367. There was no "enforcement" action in which the companies could raise preemption as a defense; the plaintiffs simply could no longer get government contracts. This Court held that the state law was preempted, necessarily presuming that there was a right of action under the Supremacy Clause that could be asserted directly and not merely in defense of an enforcement action. *Id.* at 367; *see also PhRMA*, 538 U.S. at 649-670 (plurality opinion); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (seven Justices resolving Medicaid-based preemption claim on the merits where that claim was raised affirmatively and not in defense to an enforcement action); *supra* pp. 10-11 (noting other examples of direct constitutional claims being entertained where they could not have been raised as defenses to enforcement actions).

Second, a rule requiring preemption claims to be advanced defensively only, while allowing claims based on a violation of constitutional *rights* to go forward in federal court under § 1983, would be extraordinarily inefficient and would undermine the effective vindication of federal law. Litigants frequently pursue both preemption theories and other constitutional claims. This Court's cases teem with examples: businesses commonly pursue both preemption claims and claims under the Commerce, Contracts, or Due Process Clauses; immigrants pursue both preemption claims and claims under the Equal Protection Clause and First Amendment; racial minorities pursue both statutory claims and claims under the Fourteenth and Fifteenth Amendments. Very often, courts turn to the preemption claim first in order to avoid reaching difficult con-

stitutional questions. *See, e.g., Crosby*, 530 U.S. 363 (holding state procurement statute preempted by federal Burma statute, and thereby avoiding dormant Foreign Commerce Clause claim); *Hines*, 312 U.S. 52 (holding Pennsylvania registration law for noncitizens preempted by federal legislation enacted while the case was before the Supreme Court, and thus avoiding equal protection claim).

If litigants could not pursue both preemption claims (directly) and other constitutional claims (under § 1983) in a single action for equitable relief, but were required to pursue preemption theories not cognizable under § 1983 only in state court, then they would be forced either to divide their federal claims between federal and state courts—which could well be barred by rules against splitting causes of action—or to forgo the federal forum for their § 1983 claims—which would be contrary to the strong congressional policy in favor of affording a federal forum for such claims. *See, e.g., Patsy* v. *Board of Regents of Fla.*, 457 U.S. 496 (1982). The far more efficient and sensible rule, as well as the one more consistent with this Court's decisions, is to allow equitable claims based on all provisions of the Constitution, including the Supremacy Clause, to be entertained in affirmative litigation through an action directly under the Constitution.

In addition, the rule proposed by petitioner and its amici would not adequately assure the supremacy of federal law. Many Supremacy Clause claims cannot be raised defensively at all, because there is no enforcement action in which they can be raised; in such circumstances, an affirmative direct action under the Constitution is the only way in which the supremacy of federal law could be established. *See* Sloss, *Constitutional Remedies for Statutory Actions*, 89 Iowa L. Rev. 355,

406 (2004) (discussing such claims). And even when a litigant might be able to assert his federal claim in defense of state enforcement actions or in defense to state common law claims, his ability to establish the supremacy of federal law should not be dependent on the venues that state law has happened to make available.[11] Indeed, this Court has long recognized that "it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury." *Vicksburg Waterworks*, 185 U.S. at 82.

The history of the civil rights movement in this country well illustrates the need to enforce federal rights in the federal courts, without reliance on legislative grace or the vagaries of state law. Had § 1983 never been enacted, it could hardly be the case that state laws providing for segregated schools, white primaries, and restrictions on immigrants could have gone unchallenged. Plaintiffs could challenge, and did challenge, such unconstitutional state laws directly under the Supremacy Clause. And nothing in the Supremacy Clause suggests that it may not also be used directly to challenge state laws because they conflict with a federal law, and not (or not just) the federal Constitution. The Supremacy Clause itself provides that both the Constitution "*and* the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. Const. art. VI (emphasis added).

---

[11] *Cf. Haywood* v. *Drown*, 129 S. Ct. 2108 (2009) (state courts cannot refuse to entertain certain classes of federal claims); *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356 (1990) (state court cannot apply state sovereign-immunity principles to refuse adjudication of federal law claim); *Testa* v. *Katt*, 330 U.S. 386 (1947) (state courts cannot discriminate against federal claims).

Finally, nothing in the Supremacy Clause or this Court's precedent indicates that statutes enacted pursuant to Congress's Spending Clause power should be treated any differently than statutes enacted pursuant to other sources of congressional power, *i.e.*, that direct causes of action may not be brought to vindicate the federal structural interest in the supremacy of Spending Clause statutes. Indeed, numerous Spending Clause statutes—including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act—are critical in preventing discrimination and protecting civil liberties, and many others—such as Medicaid and the Supplemental Nutrition Assistance Program (previously called the Food Stamp Program)—provide a critical safety net on which low-income individuals rely for survival.

II. Precluding Direct Rights Of Action Under The Supremacy Clause Would Have Broad And Harmful Consequences For Maintaining The Supremacy Of Federal Law

An action under the Supremacy Clause provides an important—and sometimes the only—avenue to vindicate the supremacy of federal law. Barring a right of action under the Supremacy Clause could effectively foreclose this critical avenue for persons, especially minorities, immigrants, and low-income individuals, who depend on federal law and who would otherwise be subject to invalid state and local laws.

A. Minorities, Immigrants, And Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws

Racial minorities, immigrants, and low-income individuals continue to rely directly on the Supremacy Clause to challenge invalid state and local laws in many important areas, including immigration, fair housing, public assistance, and health care. Many of those cases have involved legislation enacted under Congress's Spending Clause power, and the courts have routinely adjudicated and sometimes invalidated state laws that conflicted with the federal legislation.

For example, several plaintiffs in recent years have used the Supremacy Clause to challenge the increasing number of state laws that seek to restrict immigrants' rights, including immigrants' employment opportunities. In *Chamber of Commerce* v. *Edmondson*, 594 F.3d 742 (10th Cir. 2010), plaintiffs claimed that provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007, which created new employee verification rules and imposed sanctions on employers that allegedly hire undocumented immigrants, conflicted with federal immigration law, which sets forth a comprehensive scheme prohibiting the employment of such individuals. The Tenth Circuit, which upheld in part a preliminary injunction against enforcement of the state law, explained that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.* at 756 n.13 (internal quotation marks omitted); *see also Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968 (2011) (adjudicating preemption challenge to Arizona law providing for the revocation or suspension of licenses in certain circumstances

of state employers who knowingly hire undocumented immigrants, but finding no preemption).

Numerous other courts similarly have addressed preemption challenges, under the Supremacy Clause, to state and local laws that affect immigrants' access to housing and other vital services. *See Georgia Latino Alliance for Human Rights* v. *Deal*, No. 11-cv-1804, 2011 WL 2520752, at *6 (N.D. Ga. June 27, 2011) (finding independent jurisdictional grounds under the Supremacy Clause to allow a preemption challenge against Georgia's Illegal Immigration and Enforcement Act of 2011 and entering preliminary injunction); *Buquer* v. *City of Indianapolis*, No. 11-cv-708, 2011 WL 2532935, at *2 (S.D. Ind. June 24, 2011) (considering a Supremacy Clause challenge to an Indiana law that allows, *inter alia*, law enforcement officers to make a warrantless arrest of an immigrant under certain conditions and entering preliminary injunction); *Villas at Parkside Partners* v. *City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007) (considering a Supremacy Clause challenge to city ordinance that essentially "created its own classification scheme for determining which noncitizens may rent an apartment" in the city and entering preliminary injunction), *permanent injunction entered*, 577 F. Supp. 2d 858, 879 (2008); *League of United Latin Am. Citizens* v. *Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (finding preempted most provisions of a state law that, *inter alia*, restricted immigrants' access to health care, social services, and education).

Low-income individuals have likewise invoked the Supremacy Clause to ensure compliance with federal housing laws. In *Kemp* v. *Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010), a single mother of two argued that municipal

rules unlawfully allowed the Chicago Housing Authority to terminate her public housing assistance in circumstances other than those specified and limited by the United States Housing Act of 1937. Kemp sought to enjoin the local law as preempted under the Supremacy Clause. Although the court ultimately did not grant relief because of the Anti-Injunction Act, it concluded that the Supremacy Clause "create[s] rights enforceable in equity proceedings in federal court," and that it could therefore exercise jurisdiction over Kemp's preemption claim. *Id.* at *3 (internal quotation marks omitted).

Persons receiving public assistance have also invoked the Supremacy Clause to challenge state laws that terminate medical or other benefits in contravention of federal law. For example, in *Comacho* v. *Texas Workforce Commission*, 408 F.3d 229 (5th Cir. 2005), the court invalidated under the Supremacy Clause state regulations that expanded the circumstances, beyond those allowed by federal law, under which Medicaid benefits could be cut off for low-income adults receiving assistance under the federal Temporary Assistance to Needy Families program.

Finally, the Eighth Circuit in *Lankford* v. *Sherman*, 451 F.3d 496 (8th Cir. 2006), relied directly on the Supremacy Clause to preliminarily enjoin a Missouri regulation that limited Medicaid coverage of durable medical equipment to certain populations, making most Medicaid recipients in Missouri ineligible to receive such items even if medically necessary. *Id.* at 509. The court found that the regulation conflicted with Medicaid's requirements and goals and therefore was likely preempted under the Supremacy Clause. *Id.* at 513 (holding that plaintiffs had "established a likelihood

of success on the merits of their preemption claim" for obtaining a preliminary injunction).

The Supremacy Clause right of action therefore remains critically important to minorities, immigrants, and low-income persons in our society who rely on it for vindication of federal law. The availability of that direct action ensures that state and local governments cannot undermine federal law by enacting statutes and regulations that deviate from federal requirements but would, absent a Supremacy Clause action, be effectively insulated from judicial review.

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests

Precluding a right of action under the Supremacy Clause would leave important rights and interests effectively unprotected. Not only will the rights of individual litigants seeking to invalidate unconstitutional state laws be harmed, but important federal supremacy interests could go unprotected as well.

First, precluding rights of action under the Supremacy Clause would leave few, if any, effective remedies to force state compliance with many federal laws that are intended to benefit minorities, immigrants, and low-income persons in our society. In the context of laws enacted under Congress's Spending Clause power, the termination of federal funding may sometimes be theoretically available to remedy the State's failure to comply with its obligations under the Medicaid Act or other Spending Clause laws, *see PhRMA*, 538 U.S. at 675 (Scalia, J., concurring in the judgment), but that remedy is so rare and drastic as to be effectively unavailable as a meaningful enforcement tool. As commentators have explained, both political considerations

and procedural hurdles make withdrawal of federal funding an illusory remedy. *See, e.g.*, Mank, *Suing Under § 1983: The Future After* Gonzaga University v. Doe, 39 Hous. L. Rev. 1417, 1431-1432 (2003) ("[A]s a practical matter, federal agencies rarely invoke the draconian remedy of terminating funding to a state found to have violated the [federal] conditions because there are often lengthy procedural hurdles that allow a state to challenge any proposed termination of funding, and members of Congress from that state will usually oppose termination of funding."); Perkins, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7, 32 (2002) ("[T]he Medicaid Act provides for the Federal Medicaid oversight agency to withdraw federal funding if a State is not complying with the approved State Medicaid plan; however, ... this is a harsh remedy that has rarely, if ever, been followed through to its conclusion."); Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 292-293 (1996) ("[O]ften the agency's only enforcement mechanism is a cutoff of federal funds for the program[,] ... [which] is rarely, if ever, invoked.").[12]

Moreover, termination of federal funding would in many circumstances be counterproductive and contrary to Congress's intent that the funding program be implemented to provide a wide benefit. Indeed, persons

---

[12] As respondents point out (Cal. Pharmacists Br. 2-3, 17), this case shows how difficult it can be for the Executive Branch to enforce the supremacy of federal law by itself; even after the responsible federal agency disapproved state rate cuts as inconsistent with federal law, the State continued to implement its invalid legislation.

who receive crucial benefits and services from federal programs usually do not want federal funding to be terminated. Terminating federal funding would not protect the interests of those injured by the State's noncompliance with federal law; rather, it would harm the very people Congress intended to benefit. *See Cannon* v. *University of Chi.*, 441 U.S. 677, 704-705 (1979) (explaining that "termination of federal financial support for institutions engaged in discriminatory practices ... is ... severe" and "may not provide an appropriate means of accomplishing" the purposes of the statute); *see also* Hills, *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1227-1228 (1999) ("[T]he sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds will injure the very clients that the federal government wishes to serve.").

The more effective way to vindicate the objectives of federal law is to allow for the important role that private parties play in enforcing the supremacy of federal statutes. As the United States previously argued in this case, "those programs in which the drastic measure of withholding all or a major portion of federal funding is the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions in appropriate circumstances." *See* U.S. Cert. Amicus Br. 19. In such circumstances, an injunction would force a State to comply with the federal provision at issue without harming the intended beneficiaries of the federal program.

Nor would it be appropriate to force individuals who depend on federal law to rely exclusively on the federal government to bring affirmative litigation to enforce compliance with the Supremacy Clause. Private rights of action are necessary because the government lacks the resources to police preemption disputes between States and private parties. *See* Sloss, *Constitutional Remedies For Statutory Actions*, 89 Iowa L. Rev. at 404. Private rights of action "increase the social resources devoted to law enforcement, thus complementing government enforcement efforts." Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 108 (2005); *see also Ahlborn*, 547 U.S. at 291. In short, absent a right of action under the Supremacy Clause there could well be no meaningful remedy at all for state noncompliance.[13]

A private right of action under the Supremacy Clause serves other important values as well. The Supremacy Clause supports the structural guarantee of

---

[13] Indeed, it is not entirely clear that the federal government would always be authorized to sue to compel enforcement of federal law. Private plaintiffs directly affected by state laws have Article III standing to sue to enjoin their enforcement; the federal government might not. And if private plaintiffs did not have a direct right of action to sue under the Supremacy Clause, it might well be questioned whether the United States could sue without its own statutory cause of action. *Cf. United States* v. *City of Phila.*, 644 F.2d 187 (3d Cir. 1980) (holding that United States may not sue local governments for injunction against violation of Fourteenth Amendment, absent statutory authority to sue). The Court need not resolve those issues in this case, but at a minimum there would be no assurance that enforcement by the United States would necessarily be available if private lawsuits were not permitted.

federalism—namely, that federal law will remain paramount. And that interest can only be effectively vindicated by ensuring that preempted state laws are invalidated—a goal that, for the reasons described above, can best be achieved through a private right of action. In addition, a private right of action, by allowing robust enforcement for preemption claims, fosters uniformity and predictability in the application of both federal and state law.[14] Thus, in order to realize the Constitution's fundamental promise that federal law will remain paramount over invalid state and local laws, it is essential that this Court continue—as it has done for nearly two hundred years—to allow litigants to bring preemption challenges directly under the Supremacy Clause.

CONCLUSION

The judgments of the court of appeals should be affirmed.

---

[14] Preemption claims in immigration and other areas of law have also been critical to preserving the federal government's paramount role in foreign policy. *See, e.g.*, *Hines*, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *id.* at 66-67; *Toll* v. *Moreno*, 458 U.S. 1, 10-13 (1982).

Respectfully submitted.

MICHAEL D. GOTTESMAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, N.Y. 10022

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
FOUNDATION
125 Broad Street
New York, N.Y. 10025

VICTOR VIRAMONTES
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
634 S. Spring Street
11th Floor
Los Angeles, CA 90014

PAUL R.Q. WOLFSON
Counsel of Record
SHIRLEY CASSIN WOODWARD
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

JOHN PAYTON
DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, N.Y. 10013

JOSHUA CIVIN
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
1444 I Street, N.W.
Washington, D.C. 20005

AUGUST 2011

RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, and 10-238

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL.

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA, ET AL.

v.

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, STATE OF CALIFORNIA,

v.

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, FEDERATION OF AMERICAN HOSPITALS, NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS, NATIONAL ASSOCIATION OF COMMUNITY HEALTH CENTERS, NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE, AND SAFETY NET HOSPITALS FOR PHARMACEUTICAL ACCESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CHARLES A. LUBAND
DAVID Z. GROSS
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, N.Y. 10036

MATTHEW B. ARNOULD
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
LARRY S. GAGE
BARBARA D. EYMAN
ROPES & GRAY LLP
One Metro Center
700 12th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

Library of Congress
Law Library

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional Counsel:

MELINA REID HATTON
MAUREEN D. MUDRON
American Hospital Association
325 Seventh Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 638-1100

DONNA D. FRAICHE
Counsel to the American Hospital Association
Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C.
201 St. Charles Avenue
Suite 3600
New Orleans, LA 70170
(504) 566-5201

IVY BAER
KAREN FISHER
Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

LISA GILDEN
The Catholic Health Association of the United States
1875 Eye Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 296-3993

JEFFREY G. MICKLOS
Federation of American Hospitals
801 Pennsylvania Avenue, N.W.
Suite 245
Washington, D.C. 20004
(202) 624-1521

ROGER SCHWARTZ
National Association of Community Health Centers
1400 Eye Street, N.W.
Suite 910
Washington, DC 2005
(202) 296-3900

TAMARA L. SELTZER
Counsel to the National Council for Community Behavioral Healthcare
Progressive Policy Solutions
1112 Lamont St, NW
Washington, DC 20010
(202) 257-9084

WILLIAM H. VON OEHSEN
MAUREEN TESTONI
Safety Net Hospitals for Pharmaceutical Access
1501 M Street, NW
Washington, DC 20005
202-552-5859

TABLE OF CONTENTS

Interest of amici 1
Introduction and summary 2
I. Supremacy Clause challenges play a critical role in vindicating the primacy of the Medicaid Act over inconsistent state laws 7
A. Congress required states to set Medicaid payment rates in a manner that would ensure adequate access to health care for Medicaid beneficiaries 9
B. Reduced payment rates threaten the already fragile system for delivering the level of services mandated by Congress 11
C. State "flexibility" in administering the Medicaid program does not extend to reducing beneficiary access in response to budgetary shortfalls 15
D. Absent Supremacy Clause suits, states will continue making indiscriminate rate cuts, thus threatening Medicaid's ability to serve its congressional purpose 16
1. CMS lacks the information that would be necessary to assess state compliance with Section 30(A) 17
2. Federal injunctive relief provides a necessary complement to hhs's enforcement powers 19
II. There is no basis to conclude that a Supremacy Clause challenge is particularly inappropriate in the Medicaid context 21
A. The availability of a Supremacy Clause challenge does not depend on whether the Medicaid Act creates a cause of action or an individually enforceable right 23

B. A Supremacy Clause cause of action is not limited to parties who are "regulated" by the invalid state statute, but if it were, Medicaid providers would qualify 28
C. There is no basis for according Spending Clause legislation less effect under the Supremacy Clause 31
D. Congress did not adopt an exclusive administrative system to enforce Section 30(A) that would preclude challenges under the Supremacy Clause 32
Conclusion 33
Appendix: Description of amici curiae 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Alden v. *Maine*, 527 U.S. 706 (1999) 23, 24

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 24

American Insurance Ass'n v. *Garamendi*, 539 U.S. 369 (2003) 6, 26

Amisub (PSL), Inc. v. *Col. Dep't of Soc. Services*, 879 F.2d 789 (10th Cir. 1989), cert. denied 496 U.S. 935 (1990) 16

Ark. Dep't. of Health & Human Servs. v. *Ahlborn*, 547 U.S. 268 (2006) 26, 32

Astra USA, Inc. v. *Santa Clara County*, 131 S. Ct. 1342 (2011) 32

Blum v. *Bacon*, 457 U.S. 132 (1982) 31

Bond v. *United States*, 131 S. Ct. 2355 (2011) 7, 27, 30

Capital Cities v. *Crisp*, 467 U.S. 691 (1984) 25

Carleson v. *Remillard*, 406 U.S. 598 (1972) 31

Cort v. *Ash*, 422 U.S. 66 (1975) 24

Crosby v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) ..... *passim*

Dalton v. *Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) 3

Ex parte Young, 209 U.S. 123 (1908) 23

Gade v. *Nat'l Solid Waste mgmt. Ass'n*, 505 U.S. 88 (1992) 25

Golden State Transit Corp. v. *City of Los Angeles*, 493 U.S. 103 (1989) 21, 25

Green v. *Mansour*, 474 U.S. 64 (1985) 5, 24

Independent Living Center v. *Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) 9, 16

Kan. Hosp. Ass'n v. *Whiteman*, 835 F. Supp. 1556 (D. Kan. 1993) 16

Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) 25

Maine v. *Thiboutot*, 448 U.S. 1 (1980) 25

Minn. Homecare Ass'n v. *Gomez*, 108 F.3d 917 (8th Cir. 1997) 16

Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 23

Pennsylvania Prot. & Advocacy, Inc. v. *Houstoun*, 228 F.3d 423 (3d Cir. 2000) 31

Pharm. Research & Mfrs. of Am. v. *Walsh*, 538 U.S. 644 (2003) 25

Rehab. Ass'n of Va. v. *Kozlowski*, 42 F.3d 1444 (4th Cir. 1994), cert. denied 516 U.S. 811 (1995) 30

Schweiker v. *Hogan*, 457 U.S. 569 (1982) 7

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 21, 23

Suter v. *Artist M.*, 503 U.S. 347 (1992) 25

Townsend v. *Swank*, 404 U.S. 282 (1971) 31

United States v. *Arizona*, 641 F.3d 339 (9th Cir. 2011) 29

United States v. *Locke*, 529 U.S. 89 (2000) 25

Verizon Maryland, Inc. v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002) 23

Zschernig v. *Miller*, 389 U.S. 431 (1968) 6, 26

STATUTES AND REGULATIONS

42 U.S.C. 256b(a) 32

42 U.S.C. 1315(a) 10

42 U.S.C. 1320a-7b(d) 29

42 U.S.C. 1395dd *et seq.* 30

42 U.S.C. 1396 *et seq.* 7

42 U.S.C. 1396a(a) 10

42 U.S.C. 1396a(a)(10) 10

42 U.S.C. 1396a(a)(30)(A) ..... *passim*

42 U.S.C. 1396c 19

42 U.S.C. 1396d(a)(1)-(5), (17), (21) 10

42 U.S.C. 1396n 10

A.R.S. § 11-1051 29

Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 8

Cal. Welf. & Inst. Code § 14019.4(a) & (c) 29

Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009 (1996) 27

31 C.F.R. pt. 537 (2003) 27

42 C.F.R. 430.18 18

42 C.F.R. 430.35 19

42 C.F.R. 430.76 18

42 C.F.R. 447.15 30

42 C.F.R. 447.205 17

74 Fed. Reg. 29703 (June 23, 2009) 18

75 Fed. Reg. 80058 (Dec. 21, 2010) 18

76 Fed. Reg. 26342 (May 6, 2011) 15, 18

76 Fed. Reg. 34711 (June 14, 2011) 18

76 Fed. Reg. 44591 (July 26, 2011) 18

OTHER AUTHORITIES

Linda C. Baker & Laurence S. Baker, *Excess Cost of Emergency Department Visits for Nonurgent Care*, 13 Health Affairs 162 (Nov. 1994) 15

California HealthCare Foundation, Issue Brief: Overuse of Emergency Departments Among Insured Californians (2006) 14

Centers for Medicare & Medicaid Services, Medicaid State Plan Amendments, https://www.cms.gov/MedicaidGenInfo/StatePlan/list.asp (accessed July 11, 2011) 18

Peter J. Cunningham & Len M. Nichols, *The Effects of Medicaid Reimbursement on the Access to Care of Medicaid Enrollees: A Community Perspective*, 62 Med. Care Research & Rev. 676 (2005) 14

Eljay LLC, A Report on Shortfalls in Medicaid Funding for Nursing Home Care (2010) 12

Exec. Order No. 13,047, § 7, 62 Fed. Reg. 28,301 (May 20, 1997) 27

H.R. Rep. No. 101-247 (1989) 11

Kaiser Commission on Medicaid and the Uninsured, Physician Willingness and Resources to Serve More Medicaid patients: Perspectives from Primary Care Physicians (2011) 14

Medicaid and CHIP Payment and Access Commission ("MACPAC"), Report to the Congress on Medicaid and CHIP (2011) 8, 14

Milliman, Hospital & Physician Cost Shift: Patient Level Comparison of Medicare, Medicaid, and Commercial Payers (2008) 12

National Association of Children's Hospitals and Related Institutions, FY 2009 Annual Survey on Utilization and Financial Indicators of Children's Hospitals (2009) 12

Sara Rosenbaum, *Medicaid and Access to Health Care – A Proposal for Continued Inaction?*, 365 New Engl. J. Med. 102 (July 14, 2011) 18

Kevin Sack, *As Medicaid Payments Shrink, Patients are Abandoned*, N.Y. Times, March 15, 2010 13

Bradley J. Sayles, *Preemption or Bust: A Review of Recent Trends in Medicaid Preemption Actions*, 27 J. Contemp. Health L. & Pol'y 120 (2011) 30

The Lewin Group, Analysis of Medicaid Reimbursement in Oregon 44-45 (2003) 13

U.S. Government Accountability Office, Medicaid and CHIP: Most Physicians Serve Covered Children but Have Difficulty Referring Them for Specialty Care, GAO-11-624 (2011) 14

U.S. Government Accountability Office, Value in Health Care: Key Information for Policymakers to Assess Efforts to Improve Quality While Reducing Costs, GAO-11-445 (2011) 15

INTEREST OF AMICI[1]

Amici are the American Health Care Association, the American Hospital Association, the Association of American Medical Colleges, the Catholic Health Association of the United States, the Federation of American Hospitals, the National Association of Children's Hospitals, the National Association of Community Health Centers, the National Association of Public Hospitals and Health Systems, the National Council for Community Behavioral Healthcare, and Safety Net Hospitals for Pharmaceutical Access.[2] Amici include associations and networks of hospitals, health systems, and other healthcare providers and collectively represent over 20,000 facilities, in addition to more than one hundred thousand individual practitioners, who supply critically needed medical services to millions of Americans throughout the nation. Amici share a strong interest in the proper administration and enforcement of the statutory requirements of the Medicaid Act.

As Medicaid providers, members of our organizations are acutely aware of the difficulties Medicaid recipients face when seeking primary, secondary, and tertiary care. Despite a continued commitment to treating the Medicaid population, increased Medicaid volume at

---

[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A short description of each of the amici organizations is included in an appendix hereto.

reduced rates threatens our organizations' members' long-term financial viability and ability to adequately serve Medicaid recipients.

The Supremacy Clause of the Constitution plays a critical part in the system of structural federalism adopted by the Founders. Provider suits such as those brought by respondents vindicate the primacy of federal law by ensuring that the Medicaid Act is not undermined or subverted by conflicting state law, and that the Medicaid program serves Congress's purpose of providing meaningful benefits to Medicaid recipients. Accordingly, amici curiae and their members have a substantial interest in the important issues raised in these cases.

INTRODUCTION AND SUMMARY

Petitioners ask the Court to hold that Medicaid providers are powerless to stop California from enforcing against them drastic cuts in Medicaid payment rates that violate the mandates of federal law. As these cases come to the Court, it is taken as a given that California's indiscriminate, across-the-board 10% cut in rates, without any consideration of the impact of those cuts on beneficiaries' access to care, violates the Medicaid Act. It is also established that respondents, Medicaid providers, are directly and substantially injured by these cuts, which further reduce payment rates that are, for many providers, already significantly below the cost of providing care. Finally, it is established that the administrative review process is singularly ineffective at vindicating the supremacy of federal law. In fact, petitioners have essentially disregarded the administrative process for more than two years, and simply ignored the federal oversight agency when it rejected

California's plan amendment as unsupported by any evidence. Petitioners nonetheless contend that, even assuming all of this, Medicaid providers have no cause of action under the Supremacy Clause to seek a declaration that the cuts are invalid and an injunction preventing their enforcement against providers. Petitioners are wrong.

1. The Medicaid program is responsible for providing access to medical care for more than a quarter of the population of the United States and one third of all children, a percentage that is likely to grow even higher. One of the central requirements of any state Medicaid program is that the program must ensure access for beneficiaries to medical services equal to the access enjoyed by the general population.

Dramatic, indiscriminate cuts of the type at issue in these cases pose a serious threat to an already overtaxed safety net for our most vulnerable citizens, including millions of seniors, children, pregnant women and people with disabilities. Hospitals and nursing homes already are paid by Medicaid programs at rates far below their costs. Hospitals, on average, are compensated at rates 15% less than their costs, and nursing home facilities, on average, are paid at rates almost 10% below provider costs. As a result, providers have been forced to forgo new initiatives and in some cases cease providing certain services. Low reimbursement rates have caused large numbers of doctors to withdraw from the program, with adverse consequences for the entire safety net. It has, for example, become increasingly difficult for Medicaid beneficiaries to find a physician, especially a specialist. Medicaid beneficiaries have difficulty obtaining specialty consultations at an alarming rate, roughly three times more often than

insured patients. And, as access to physicians becomes more difficult, patients turn to hospital emergency departments, an inefficient use of resources that only adds additional pressure to an already over-taxed system.

Multiple courts of appeals have held that across-the-board rate cuts, adopted for purely budgetary reasons and without considering their effect on quality, efficiency, or the availability of care for beneficiaries, are precluded by the Medicaid Act. Lawsuits brought under the Supremacy Clause are the only effective way to prevent states from implementing illegal rate cuts.

The system of administrative oversight by the Department of Health and Human Services ("HHS") is, by constrast, structurally incapable of preventing states from acting in derogation of Medicaid's equal access requirement. Limited to what information the state provides it, HHS is ill-equipped to serve as an independent check against violations of the federal mandate. Nor, when a violation is identified, does HHS have an effective way to bring the state into compliance. The present case, in which petitioners simply ignored the federal administrative proceeding, and continued to implement California's rate cuts even after the proposed state plan amendment was rejected, demonstrates the inadequacy of the administrative scheme.

Without the ability to bring a suit for declaratory and injunctive relief under the Supremacy Clause, respondents would have no avenue for relief, but would instead simply have to endure California's illegal rate cuts.

2. This Court has repeatedly recognized that "the availability of prospective relief of the sort awarded in

Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). Petitioners acknowledge the numerous cases in which this Court has entertained a Supremacy Clause challenge and do not genuinely dispute that there are many circumstances in which such a cause of action exists. *See* Pet. Br. 42-44. Petitioners spend most of their brief arguing instead that such a cause of action should not be recognized in the specific context of a suit to set aside a state law that is invalid because it conflicts with 42 U.S.C. 1396a(a)(30)(A) ("Section 30(A)"). Those arguments are mistaken.

There is no basis for petitioners' contention that a Supremacy Clause challenge is inappropriate in the Section 30(A) context because Congress did not create a separate statutory cause of action "to enforce" Medicaid or confer privately enforceable "individual rights." Pet. Br. 20, 25. The absence of a separate statutory cause of action is of no moment because a plaintiff asserting a cause of action under the Supremacy Clause does not seek to "enforce" the statute. Such a suit does not afford affirmative relief, such as an injunction directing the defendant to take an affirmative act, or retrospective relief, such as damages. Rather, a Supremacy Clause challenge is limited to vindicating the primacy of federal law over inconsistent state law through a declaration that the state law is invalid and an injunction against its enforcement.

The preemptive effect of federal law under the Supremacy Clause does not depend upon Congress having created a cause of action against the state. Congress

need not specify a statute's preemptive effect at all. Indeed, state law can be invalid under the Supremacy Clause even in the absence of congressional legislation. In *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 369 (2003), for example, an executive agreement was held to preempt a California statute purporting to regulate conduct relating to Holocaust-era insurance policies. *Id.* at 419-420. See also *Zschernig* v. *Miller*, 389 U.S. 431, 441 (1968) (state law interfering with foreign policy can be preempted "even in the absence of a treaty"). And a preemptive federal statute may be directed at private parties, or even federal officials, rather than at the state. See, *e.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (statute authorizing President to adopt calibrated sanctions policy against Burmese regime preempted state secondary boycott of companies doing business with Burma). In such circumstances, one would hardly expect Congress to create a private cause of action against the state solely on the off-chance a state enacted legislation to frustrate the federal scheme.

Petitioners' other arguments also fail to justify refusing to recognize a Supremacy Clause cause of action in this case. There is no basis for petitioners' assertion that the Supremacy Clause can only be vindicated by parties who are "regulated" by the invalid state statute. Pet. Br. 43. In *Crosby*, for example, Massachusetts' policy of not contracting with companies doing business in Burma could not be "enforced" against private entities, yet companies that were ineligible to receive state contracts were permitted to bring a Supremacy Clause challenge to the state statute. To the extent that being "regulated" is an essential prerequisite, Medicaid providers are unquestionably at least as regu-

lated as (if not more than) other businesses that have brought successful Supremacy Clause challenges before this Court. Providers thus plainly have a sufficiently direct injury from California's rate cuts to confer standing. Precluding such directly injured parties from bringing a Supremacy Clause challenge would be inconsistent with this Court's recognition that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when enforcement of those laws causes injury that is concrete, particular, and redressable." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011).

Nor does the fact that Medicaid was enacted under Congress's Spending Clause power diminish its preemptive effect. And, finally, contrary to petitioners' suggestion, Congress has not impliedly precluded a Supremacy Clause cause of action by creating an administrative remedy to enforce Section 30(A) that must be exclusive in order to be effective. Indeed, the administrative process for overseeing state Medicaid programs is structurally incapable of preventing states from violating Section 30(A).

I. SUPREMACY CLAUSE CHALLENGES PLAY A CRITICAL ROLE IN VINDICATING THE PRIMACY OF THE MEDICAID ACT OVER INCONSISTENT STATE LAWS

Congress's purpose in establishing the Medicaid program, codified in Title XIX of the Social Security Act ("SSA"), 42 U.S.C. 1396 *et seq.*, was to provide comprehensive health benefits to "the most needy in the country." *Schweiker* v. *Hogan*, 457 U.S. 569, 590 (1982) (quoting H.R. Rep. No. 213, 89th Cong., 1st

Sess., 66 (1965)). While originally targeting limited subsets of individuals in particularly difficult circumstances, Medicaid was gradually expanded to protect additional populations unable to secure insurance in the private market. Many beneficiaries are unable to work, and those who can are often unable to secure private, employer-sponsored insurance. See Medicaid and CHIP Payment and Access Commission ("MACPAC"), Report to the Congress on Medicaid and CHIP 10 (2011) (the "MACPAC Report"). Today, Medicaid (along with the Children's Health Insurance Program ("CHIP")) provide coverage for 75 million beneficiaries—constituting more than a quarter of the population of the United States and one-third of all children—who otherwise would likely have no health care coverage at all. *Id* at 17, 75. That figure is likely to grow even larger in the future. See, *e.g.*, Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Medicaid's beneficiaries rely on the program to guarantee them access to critical medical services, including preventive health checkups, specialist consultations, mental health counseling, and nursing home care. These 68 million people benefit from Medicaid, but only to the extent that it offers meaningful access to health care services.

As the court of appeals concluded—in a holding that this Court declined to review, and that therefore provides the basic premise of this proceeding—California's imposition of indiscriminate reductions of as much as 10 percent to Medicaid rates that were already below many providers' costs was inconsistent with the federal statutory requirements by which Congress sought to ensure adequate access to medical care for Medicaid beneficiaries. Whether Title XIX is con-

strued as establishing procedural requirements or substantive ones, California's across-the-board cuts based purely on state budgetary considerations violated the federal statutory scheme. Indeed, although "the State's own Legislative Analyst warned that the ten percent rate reduction had 'the potential to negatively impact the operation of the Medi-Cal Program and the services provided to beneficiaries by limiting access to providers and services,'" no state official even *considered* what impact the cuts might have on accessibility. *Independent Living Center* v. *Maxwell-Jolly*, 572 F.3d 644, 656 (9th Cir. 2009). Predictably, the cuts did "force[] at least some providers to stop treating Medi-Cal beneficiaries." *Id.* at 657.

A decision in favor of petitioner would allow not only California, but all states, to defy federal law with virtual impunity. Indeed, in the absence of a Supremacy Clause challenge, states will be emboldened to enforce their invalid laws against individuals and businesses who are directly injured thereby. Those injured parties will have no avenue by which to vindicate the supremacy of federal law over inconsistent state policy. Where, as here, the state disregards the requirements of Medicaid, it is the Nation's most vulnerable citizens, including millions of seniors, children, pregnant women and people with disabilities, who will suffer most.

A. Congress Required States To Set Medicaid Payment Rates In A Manner That Would Ensure Adequate Access To Health Care For Medicaid Beneficiaries

While Congress gave states a choice whether to establish a Medicaid program, if a state chooses to do so—and to accept the associated federal financial support—

it must comply with the federal requirements for the program set forth in Title XIX and implementing regulations. For those states that choose to participate in Medicaid, Congress specified those requirements that the state's "plan for medical assistance *must*" satisfy. 42 U.S.C. 1396a(a) (emphasis added).

A central requirement of Title XIX is that each state program offer meaningful medical benefits to its Medicaid beneficiaries. Title XIX lists specific services that any participating state Medicaid program "must" make available to beneficiaries, which include inpatient and outpatient hospital services, laboratory and x-ray services, nursing facility services to beneficiaries aged 21 or older, and physician services. 42 U.S.C. 1396a(a)(10), 1396d(a)(1)-(5), (17), (21). States are prohibited from limiting access to these services unless and until they receive explicit permission from HHS through a waiver. See 42 U.S.C. 1315(a), 1396n.

Congress recognized that meaningful access to these mandated services requires adequate access to health care providers. To assure such access, Congress further required that participating state programs

> must * * * provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. 1396a(a)(30)(A). Section 30(A) reflects Congress's specific and expressed intent to "assure" that "care and services are available" to Medicaid beneficiaries "at least to the extent that such care and services are available to the general population." *Ibid.*

Moreover, Section 30(A) expressly links the statutory requirement of available services to the level of payments that state programs offer providers. Because state programs do not generally provide services directly, Congress required that the state's program ensure that "payments * * * are sufficient to enlist enough providers" to make services available at a level equal to that of the general population. 42 U.S.C. 1396a(a)(30)(A). See also H.R. Rep. No. 101-247, at 2116 (1989) (noting that the expanded Section 30(A) codified a regulatory standard "requiring adequate payment levels").[3]

B. Reduced Payment Rates Threaten The Already Fragile System For Delivering The Level Of Services Mandated By Congress

A Medicaid program's ability to provide adequate access to services as required by Congress depends upon its paying rates that are adequate to attract providers. States generally do not provide Medicaid bene-

---

[3] Petitioners cite Congress's repeal of the "Boren Amendment" of Title XIX as evidence that Congress regards private suits challenging the adequacy of Medicaid payments as "antithetical" to States' flexibility in administering Medicaid. Pet. Br. 31. Petitioners are incorrect, as the repeal of the Boren Amendment in 1997 had no implications for suits to vindicate Section 30(A). See Br. of Intervenor Resp. in No. 09-958 and California Pharmacists Resp. in No. 09-1158, at 57-59.

fits directly to program beneficiaries. Instead, states contract with health care providers—physicians, dentists, hospitals, clinics, mental health centers, nursing homes, home health agencies and others—to provide them.

Medicaid payments, however, are often well below the levels needed to sustain an adequate provider network. Hospital and nursing home rates, for example, not only lag behind payments offered by Medicare and commercial payers for similar services, but also fall far short of provider costs. The hospital industry has found Medicaid margins to be on average almost *15 percent lower than hospital costs.* See Milliman, Hospital & Physician Cost Shift: Patient Level Comparison of Medicare, Medicaid, and Commercial Payers 6 (Dec. 2008). Children's hospitals experience an even greater shortfall, with Medicaid on average paying only 77 percent of their costs. National Association of Children's Hospitals and Related Institutions, FY 2009 Annual Survey on Utilization and Financial Indicators of Children's Hospitals (2009). Base payments to public hospitals on average are only 76 percent of hospital costs. And although public hospitals often have access to additional Medicaid payments to support their public missions, over 40 percent still report a loss on providing Medicaid care. National Association of Public Hospitals and Health Systems, America's Public Hospitals and Health Systems, 2009 Results of the Annual NAPH Hospital Characteristics Survey 13-14 (2010). The nursing home industry similarly has found that Medicaid pays only 91 percent of provider costs. See Eljay LLC, A Report on Shortfalls in Medicaid Funding for Nursing Home Care 2 (2010). The same study calculated that, on average, nursing homes lose $17.33 per-

Medicaid patient, per-day. See *ibid.* In other words, most providers lose money for each Medicaid beneficiary that they treat.

Unchecked, and increasingly common, reductions in Medicaid payment rates to institutional providers pose a direct threat to beneficiaries' access to medical services. Many initiatives that would improve beneficiary access to care have gone unimplemented, with hospitals concluding that high Medicaid volumes, coupled with below-cost reimbursement rates, would make these initiatives financially unsustainable. See The Lewin Group, Analysis of Medicaid Reimbursement in Oregon 44-45 (2003). Existing services have, in some cases, been discontinued for the same reason. In one highly publicized case, a hospital in Clare, Michigan, shuttered its obstetrical unit in direct response to the state's inadequate Medicaid payments. See Kevin Sack, *As Medicaid Payments Shrink, Patients are Abandoned*, N.Y. Times, March 15, 2010. The state program reimbursed only 65 percent of hospital costs. *Ibid.*

Lowering payment rates for physicians likewise presents a direct threat to Medicaid beneficiaries' access to such services. Ample evidence, including government reports, demonstrates that low reimbursement rates have led many physicians, and particularly specialists, to stop treating Medicaid patients. For example, while 79 percent of physicians participating in the Medicaid and CHIP accept all privately-insured children as new patients, less than half—only 47 percent—accept all new patients covered by Medicaid or CHIP. See U.S. Government Accountability Office, Medicaid and CHIP: Most Physicians Serve Covered Children but Have Difficulty Referring Them for

Specialty Care, GAO-11-624, at 11 (2011) ("GAO Report"). Even more troubling, another survey found that almost half of office-based physicians had difficultly referring Medicaid patients for specialty consultations, more than three times the rate of difficulty experienced in referring privately insured patients for those same services. See MACPAC Report at 132.

Physicians already cite inadequate payment as the most common reason for not accepting Medicaid patients. MACPAC Report at 132. Among physicians who do not serve Medicaid/CHIP children, 95% cited low reimbursement rates as influencing their decision. See GAO Report at 18; see also Kaiser Commission on Medicaid and the Uninsured, Physician Willingness and Resources to Serve More Medicaid patients: Perspectives from Primary Care Physicians 3 (2011) (noting that almost 90 percent of primary care practitioners who accept no or only some new Medicaid patients cite inadequate reimbursement as a reason for their decision not to participate).

Beyond the direct impact on the availability of physician services, inadequate payment rates for doctors also have the indirect effect of shifting the cost of Medicaid services to hospitals, whose resources are already strained. With shrinking access to office-based specialty care, many Medicaid beneficiaries turn to hospital emergency departments for this care. California HealthCare Foundation, Issue Brief: Overuse of Emergency Departments Among Insured Californians (2006); Peter J. Cunningham & Len M. Nichols, *The Effects of Medicaid Reimbursement on the Access to Care of Medicaid Enrollees: A Community Perspective*, 62 Med. Care Research & Rev. 676, 691 (2005). Because providing services at hospital emergency rooms is more

costly than at doctors' offices,[4] indiscriminately reducing payments to doctors results in a net reduction in efficiency for the Medicaid program.

C. State "Flexibility" In Administering The Medicaid Program Does Not Extend To Reducing Beneficiary Access In Response To Budgetary Shortfalls

Medicaid's federal-state partnership structure offers states significant flexibility in establishing delivery systems, developing payment methodologies, and setting payment rates. While this flexibility is intended to allow states to achieve the "best value" from their Medicaid programs, see 76 Fed. Reg. 26342, 26343 (May 6, 2011), states have instead repeatedly invoked this "flexibility" as an excuse to use Medicaid rate cuts to balance their budgets, resulting in undermining efficiency without improving quality, the two benchmarks by which "value" is generally assessed. See, *e.g.*, U.S. Government Accountability Office, Value in Health Care: Key Information for Policymakers to Assess Efforts to Improve Quality While Reducing Costs, GAO-11-445, at 2 (2011).

Multiple federal courts have found that Section 30(A) prohibits indiscriminate cuts to Medicaid payments in response to budgetary pressure. The Ninth Circuit found that California had failed to consider the potential impact of its 2008 and 2009 Medicaid rate cuts on efficiency, economy, quality, or access to care, and

---

[4] See Linda C. Baker & Laurence S. Baker, *Excess Cost of Emergency Department Visits for Nonurgent Care*, 13 Health Affairs 162 (Nov. 1994).

the court therefore set aside the legislation as preempted by Section 30(A). See *Independent Living Center*, 572 F.3d at 652. Other courts have reached similar conclusions. The Eighth Circuit has likewise held that Section 30(A) "mandates consideration of the equal access factors of efficiency, economy, quality of care and access to services in the process of setting or changing payment rates," and that a state therefore cannot make indiscriminate payment cuts based on budgetary grounds alone. *Minn. Homecare Ass'n* v. *Gomez*, 108 F.3d 917, 918 (1997). See also *Amisub (PSL), Inc.* v. *Col. Dep't of Soc. Services*, 879 F.2d 789, 800 (10th Cir. 1989), cert. denied 496 U.S. 935 (1990) ("[B]udgetary constraints cannot excuse noncompliance with federal Medicaid law."); *Kan. Hosp. Ass'n* v. *Whiteman*, 835 F. Supp. 1556, 1570-1571 (D. Kan. 1993) (holding that, where "the significant increase in the co-pay requirement is proposed solely because of its budgetary impact in favor of the state, without considering the other factors listed in the statute, the amendment would appear to violate 42 U.S.C. § 1396a(a)(30)(A)").

D. Absent Supremacy Clause Suits, States Will Continue Making Indiscriminate Rate Cuts, Thus Threatening Medicaid's Ability To Serve Its Congressional Purpose

Although it is well established that Congress prohibited states from simply slashing their rates in an indiscriminate fashion in order to close a budget gap, in the absence of Supremacy Clause challenges, states will remain largely free to do so. The system of federal administrative oversight is simply inadequate to protect the Medicaid Act from such state infringement. Although states must submit plans and any amendments to those plans for approval by the Centers for Medicare

and Medicaid Services ("CMS"), which administers the Medicaid program within HHS, CMS lacks the information necessary to assess the impacts of state plan amendments ("SPAs") on access to care. And the sole federal remedy once a violation is detected—withholding federal funds—is so unpalatable that states can largely ignore the federal administrative process, as petitioners have done here. Supremacy Clause challenges provide an essential mechanism for ensuring that states are not implementing Medicaid policies that are contrary to superior federal law.

1. CMS Lacks The Information That Would Be Necessary To Assess State Compliance With Section 30(A)

No formal processes currently exist by which CMS can assess the adequacy of beneficiary access to Medicaid services. To the extent CMS reviews access at all, it does so informally, in the process of reviewing an SPA. Any review in that context, however, must rely entirely on information submitted by the state, because the SPA approval process affords beneficiaries and providers no meaningful role or redress.

The administrative review process affords CMS little opportunity to gather any reliable information about the extent of beneficiaries' access to health services. While CMS requires that states provide public notice of proposed changes to payment methodologies, states need not solicit or incorporate public comments in response to this notice. 42 C.F.R. 447.205. Once an SPA is submitted, negotiations occur exclusively and privately between CMS and the state, and most disputes between CMS and the state are resolved during these negotiations. Providers have no express opportunity

for input unless CMS *denies* a SPA and the state appeals that denial to the Secretary of HHS. 42 C.F.R. 430.18. At that point, providers can seek to be recognized as parties to the hearing or to participate as amici, 42 C.F.R. 430.76, but the rarity of reconsideration requests renders provider participation virtually nonexistent.[5] Moreover, because SPA reviews relating to payment cuts arise only when a state seeks CMS permission for those cuts, the state lacks any incentive to provide transparent and objective information demonstrating the full impact of those cuts on beneficiaries' access to care.[6]

---

[5] Since June 1, 2009, CMS has approved 640 SPAs. Centers for Medicare & Medicaid Services, Medicaid State Plan Amendments, https://www.cms.gov/MedicaidGenInfo/StatePlan/list.asp (accessed July 11, 2011). During that same period, there have only been four requests for reconsideration. 74 Fed. Reg. 29703 (June 23, 2009); 75 Fed. Reg. 80058 (Dec. 21, 2010); 76 Fed. Reg. 34711 (June 14, 2011); 76 Fed. Reg. 44591 (July 26, 2011).

[6] After the Court granted certiorari in these cases, CMS issued proposed regulations to create a process by which states could demonstrate compliance with Section 30(A). 76 Fed. Reg. 26342 (May 6, 2011). These proposed regulations have been widely criticized as representing little improvement over the current SPA approval process. See Sara Rosenbaum, *Medicaid and Access to Health Care – A Proposal for Continued Inaction?*, 365 New Engl. J. Med. 102-104 (July 14, 2011). Regardless of their final form, the new regulations cannot obviate the need for a judicial remedy against state laws that violate the Medicaid Act. CMS cannot, through administrative rulemaking, give itself the power to enjoin state laws that conflict with the Medicaid Act. And, as described below, judicial injunctions against preempted state laws are the *only* effective means of vindicating the supremacy of the Medicaid Act.

2. Federal Injunctive Relief Provides A Necessary Complement To HHS's Enforcement Powers

CMS's enforcement powers are structurally inadequate to ensure state compliance with Section 30(A). To the extent CMS identifies a violation, its sole remedy is the disallowance process. Under this authority, CMS may withhold or limit Medicaid support to that state until the agency is satisfied that the program is and will continue to be compliant. 42 U.S.C. 1396c; 42 C.F.R. 430.35. However, CMS's decision to withhold federal funds, either in part or in full, is fraught with potentially adverse consequences. Such action is counterproductive from a practical perspective; the lack of federal funds would likely leave states unable to pay providers, causing providers to stop treating Medicaid beneficiaries and further exacerbating the access problem. Moreover, CMS almost certainly would be subject to acute political pressure, both from the state itself and its Congressional delegation, should it even threaten to withhold funds. Withholding funds is an extraordinary remedy to be used only in the most extreme instances of non-compliance. It is inappropriate, and likely ineffective, for disputes of a lesser magnitude.

California's 2008 and 2009 payment cuts demonstrate the limitations of HHS's enforcement powers and the essential role played by federal courts in vindicating the requirements of Section 30(A). In September 2008, after these cuts were enacted, they were submitted for CMS approval through the SPA process. See Br. of Intervenor Resp. in No. 09-958 and California Pharmacists Resp. in No. 09-1158, at 6. Within 90 days, CMS informed California that CMS could not approve the cuts because the state had provided inade-

quate information to demonstrate that the cuts would not violate federal Medicaid requirements. *Ibid.* California, however, simply ignored CMS's request for further information. *Ibid.* Finally, on November 18, 2010, over two years after California had implemented its rate cuts, CMS denied the SPAs for lack of adequate information. U.S. Cert. Amicus Br. 7. Throughout this period, while the state was simply ignoring CMS's administrative review, and even after CMS had denied approval of the SPAs, California *persisted* in paying providers at the reduced rate except where the reduced rate was specifically enjoined by the federal courts. Br. of Intervenor Resp. in No. 09-958 and California Pharmacists Resp. in No. 09-1158, at 5. The only cuts that California did not unilaterally implement were those that had been enjoined in actions brought under the Supremacy Clause.

A similar situation recently arose in Indiana, with the state once again ignoring CMS's disapproval of an SPA. The Indiana legislature had passed legislation prohibiting providers that furnish abortion services from participating in the Medicaid program. This provision went into effect on May 10, 2011. Implementing this provision immediately, Indiana then sought CMS approval through the SPA process. CMS disapproved the SPA on June 1, 2011, explaining that the Indiana law violated the Medicaid Act. Despite this disapproval, Indiana continued enforcing the legislation and CMS undertook no enforcement activities. The policy was not reversed until June 24, 2011, when the United States District Court for the Southern District of Indiana enjoined further enforcement. See Entry on Mot. For Prelim. Inj., No. 1:11-cv-630-TWP-TAB (S.D. Ind. June 24, 2011).

As these examples demonstrate, without an available cause of action under the Supremacy Clause, states would be free to adopt and enforce against providers rate cuts that are precluded by federal law.

II. THERE IS NO BASIS TO CONCLUDE THAT A SUPREMACY CLAUSE CHALLENGE IS PARTICULARLY INAPPROPRIATE IN THE MEDICAID CONTEXT

From its earliest cases, this Court has recognized that "plaintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting); *id.* at 113-114 (collecting cases so holding). And, as the Solicitor General recognizes, the Court has "decided dozens of preemption claims against state officials on the merits," U.S. Br. 17, on the premise that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Implicitly acknowledging the strength of that precedent, much of petitioners' brief, like that of the Solicitor General, assumes the availability of a cause of action under the Supremacy Clause in most circumstances, and instead argues that such a cause of action should not be recognized in the specific context of a suit to set aside a state law that is invalid because it conflicts with Section 30(A).

There is no basis, however, for petitioners' contention that a Supremacy Clause challenge is particularly inappropriate in the Medicaid context generally, or the Section 30(A) context specifically. Petitioners' argument that Congress did not create a statutory cause of action to enforce Medicaid is inapposite. Unlike a statutory cause of action or one under Section 1983, a cause of action under the Supremacy Clause does not allow a plaintiff to seek retrospective or affirmative relief, such as damages or an injunction directing the defendant to take some affirmative action. Rather, relief is limited to a declaration that the state law is invalid and an injunction against its enforcement. Moreover, the Supremacy Clause renders invalid state statutes that conflict with federal law even in circumstances where Congress would not be expected to have created a cause of action against the state. For example, state laws can be preempted even in the absence of any federal statute, or where the federal legislation, if there is any, is directed at private parties, or even federal officials, rather than at the state.

Nor do petitioners' other arguments justify refusing to recognize a Supremacy Clause cause of action in this case. This Courts' cases do not support petitioners' contention that the Supremacy Clause can only be vindicated by parties who are "regulated" by the invalid state statute. Pet. Br. 43. But, if being regulated is a necessary prerequisite, Medicaid providers are easily as regulated as other businesses that have successfully brought Supremacy Clause challenges before this Court. Nor does the fact that Medicaid was enacted under Congress's Spending Clause power diminish its preemptive effect. And, finally, contrary to petitioners' suggestion, the administrative review process for state

plans does not reflect a congressional intent to preclude other remedies against state laws that violate Section 30(A).

A. The Availability Of A Supremacy Clause Challenge Does Not Depend On Whether The Medicaid Act Creates A Cause Of Action Or An Individually Enforceable Right

While petitioners expend numerous pages seeking to prove that Congress did not provide for a statutory cause of action in the Medicaid Act itself (Pet. Br. 20-26), that question is beside the point. This Court has consistently held that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). No statutory cause of action is necessary because the foundational decision in *Ex parte Young*, 209 U.S. 123 (1908), established the authority of federal courts to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984). See *Alden* v. *Maine*, 527 U.S. 706, 755, 757 (1999).

In *Shaw*, for example, the Court upheld the federal courts' authority to grant the plaintiff relief in a Supremacy Clause challenge, despite the absence of a cause of action derived from the preemptive federal statute. The Court noted that it "frequently has resolved pre-emption disputes in a similar jurisdictional posture." 463 U.S. at 96 n.14. More recently, in *Verizon Maryland, Inc.* v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635 (2002), the Court rejected the assertion that a district court could not reach the merits of a

preemption claim unless the plaintiff had demonstrated a statutory cause of action.

Petitioners' suggestion (Pet. Br. 33) that recognition of a Supremacy Clause cause of action would permit an "end-run" around *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and *Cort* v. *Ash*, 422 U.S. 66 (1975), is mistaken. Petitioners' arguments ignore the critical distinctions between a cause of action for affirmative relief to enforce a federal right, and a suit challenging a state statute under the Supremacy Clause, which merely asks the court to set aside and enjoin enforcement of the invalid state law. "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). Indeed, in several decisions in which the Court has held a damages remedy unavailable against a state, the Court has stressed that denying a damages remedy "strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States" precisely because *Ex parte Young* and similar "[e]stablished rules provide ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause." *Alden*, 527 U.S. at 757. Here, by contrast, if respondents are denied a cause of action under the Supremacy Clause, there will be no effective "means to vindicate" the primacy of federal law over a conflicting state statute.

Petitioners' focus on the purported absence of a statutory "right" under Medicaid enforceable under Section 1983 is similarly misplaced. "[Section] 1983 does not provide the exclusive relief that the federal

courts have to offer." *Golden State Transit Corp.*, 493 U.S. at 119 (Kennedy, J., dissenting). Indeed, this Court has consistently upheld Supremacy Clause challenges without relying on either Section 1983, or the preemptive federal statute to establish a cause of action. See, *e.g.*, *Crosby*, 530 U.S. at 363; *United States* v. *Locke*, 529 U.S. 89 (2000); *Gade* v. *Nat'l Solid Waste mgmt. Ass'n*, 505 U.S. 88 (1992); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985); *Capital Cities* v. *Crisp*, 467 U.S. 691 (1984).[7]

In the Medicaid context itself, the Court has addressed preemption claims in numerous cases in which there was no individually enforceable right or statutory cause of action. In *Pharm. Research & Mfrs. of Am.* v. *Walsh*, for example, an association of drug manufacturers challenged the constitutionality of Maine's prescription drug rebate program. 538 U.S. 644, 650 (2003). All seven Justices agreed that the Supremacy Clause provided a preemption claim to challenge a state law as

---

[7] The Solicitor General's brief discusses two cases that it claims demonstrate that "the Court clearly viewed Section 1983 as the sole source of a private right of action to enforce statutory provisions governing joint federal-state programs under the SSA." U.S. Br. 29-30 (discussing *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) and *Suter* v. *Artist M.*, 503 U.S. 347 (1992)). In each of those cases, however, the plaintiffs sought affirmative relief that could not have been provided by a cause of action under the Supremacy Clause alone. See *Suter*, 503 U.S. at 353 (noting district court's "injunction requiring petitioners to assign a caseworker to each child placed in DCFS custody within three working days of the time the case is first heard in Juvenile Court"); *Thiboutot*, 448 U.S. at 3 (noting that the Superior Court had "ordered [petitioners] to adopt new regulations * * * and to pay the correct amounts retroactively to respondents").

invalid under the Medicaid Act. *Id.* at 667-668. See also *Ark. Dep't. of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 274, 292 (2006) (Medicaid Act preempted ADHS' assertion of a claim against proceeds that a beneficiary received from a personal injury settlement).

Petitioners' argument that a Supremacy Clause challenge is unavailable whenever Congress has failed to provide a statutory cause of action or "right" is particularly misplaced in light of the fact that state law can be preempted under the Supremacy Clause even in the absence of federal legislation. In *American Insurance Ass'n* v. *Garamendi*, for example, the Court upheld a Supremacy Clause challenge based on conflict between a state law and federal foreign policy reflected in Executive Agreements. 539 U.S. 396, 419-420 (2003). See also *Zschernig* v. *Miller*, 389 U.S. 431, 441 (1968) (holding that "[w]here [state] laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in the absence of a treaty, a State's policy may disturb foreign relations."). Because federal "law" that is not enacted by Congress can preempt inconsistent state policy, it would be incongruous to require a congressionally enacted private right of action in order to vindicate that preemptive federal policy.

Even where Congress has itself enacted the preemptive law in question, it may have had no occasion to consider whether to create a cause of action to challenge a conflicting state law. In *Crosby*, for example, the preemptive statute at issue authorized the President to impose sanctions on the Burmese regime. 530 U.S. at 366. The statute disavowed creation of any individual rights, and it did not provide a cause of action against anyone, much less against a state in the unexpected event that one might adopt its own conflict-

ing Burma sanctions policy. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009 (1996); Exec. Order No. 13,047, § 7, 62 Fed. Reg. 28,301 (May 20, 1997) ("Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States * * * or any other person."); 31 C.F.R. pt. 537 (2003). This Court granted prospective injunctive relief notwithstanding the absence of a statutory right or cause of action. Congress undoubtedly intends that state government officers may not systematically violate federal statutes, even ones that do not directly regulate states. By recognizing an implied cause of action under the Supremacy Clause in *Crosby*, the Court gave effect to that congressional intent, and vindicated the structural federalism that is fundamental to constitutional design. See *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when enforcement of those laws causes injury that is concrete, particular, and redressable.").

Significantly, pursuant to the Supremacy Clause, federal legislation may constrain a state in ways that private actors are not. In *Crosby*, for example, the federal Burma sanctions act did not preclude a private individual or corporation from engaging in a secondary boycott of companies that did business with Burma. But, under the Supremacy Clause, *a state* was foreclosed from adopting such a sanctions policy because it undermined the President's capacity for diplomacy, which was central to the federal sanctions legislation. Conversely, a federal statute that regulates automobile manufacturers may have no direct application to states

at all, but nonetheless constrains a state from adopting legislation that conflicts with the federal standard. Thus, asking whether the statute provides a statutory cause of action to enforce its mandate tells one little, if anything, about whether Congress intended that a cause of action be available to set aside a state law that conflicts with the federal policy. In short, a statutory cause of action to enforce the statute's requirements through affirmative relief is distinct from a cause of action under the Supremacy Clause to set aside an inconsistent state law. The availability, or absence, of the former type of action is inapposite to the availability of the latter.

B. A Supremacy Clause Cause Of Action Is Not Limited To Parties Who Are "Regulated" By The Invalid State Statute, But If It Were, Medicaid Providers Would Qualify

Apparently recognizing that they cannot explain this Court's Supremacy Clause precedent by reference to statutes that provided statutory rights or causes of action, petitioners urge that the remaining cases merely represent instances in which a regulated party that might otherwise have raised preemption as a defense to an enforcement action was permitted to bring an anticipatory claim for declaratory relief. Pet. Br. 43. That explanation also fails to account for the full breadth of the Court's preemption precedent. But, to the extent petitioners' definition of "regulated" parties is broad enough to encompass the remaining precedent, Medicaid providers would easily so qualify.

Notably, petitioners appear to recognize that their framework cannot explain the Court's decision in *Crosby*, and so petitioners ignore the case. The Solicitor

General readily acknowledges that *Crosby* does not "readily" fit petitioners' artificially constructed category. U.S. Br. 23 n.8. The government contends, however, that *Crosby* is sufficiently analogous to the anticipatory assertion of a defense against enforcement because "the state law was an affirmative (and independent) exercise of the State's authority to impose and enforce what were essentially state regulatory standards." *Ibid.* But that is not accurate. In *Crosby*, Massachusetts had adopted a law prohibiting state contracting officers from purchasing goods from companies that did business with Burma. 530 U.S. at 367-370. There were no "enforcement" proceedings that could be brought against such companies; they were simply ineligible for government contracts.[8]

Even assuming that it is necessary to be a "regulated" entity in order to maintain a Supremacy Clause challenge, Medicaid providers are easily as "regulated" by a State's Medicaid payment rates as were the business plaintiffs in *Crosby*. Medicaid providers are paid directly by Medicaid for the services they provide to eligible beneficiaries, and, significantly, these payments must be accepted as payments in full. See Cal. Welf. & Inst. Code § 14019.4(a) & (c); see also 42 U.S.C. 1320a-7b(d); 42 C.F.R. 447.15; *Rehab. Ass'n of Va.* v. *Kozlowski*, 42 F.3d 1444, 1447 (4th Cir. 1994), cert. denied 516 U.S. 811 (1995). Moreover, although providers, like

---

[8] Ironically, the Solicitor General's position here would defeat its ongoing challenge to Arizona's immigration law, SB 1070. *United States* v. *Arizona*, 641 F.3d 339 (9th Cir. 2011). The federal government is not subject to enforcement under the law, and, moreover, portions of Arizona's immigration statute directly regulate only state officials. See, *e.g.*, A.R.S. § 11-1051.

states, "opt in" to Medicaid, non-participation is virtually impossible as a matter of practical necessity. Providers who choose not to participate in Medicaid face significant potential consequences. For instance, the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. 1395dd *et seq.*, requires hospitals with emergency departments to treat Medicaid beneficiaries who present themselves to those emergency departments. Violations of EMTALA carry significant civil penalties; see also Bradley J. Sayles, *Preemption or Bust: A Review of Recent Trends in Medicaid Preemption Actions*, 27 J. Contemp. Health L. & Pol'y 120, 123-124 (2011). Medicaid providers are, thus, at least as directly affected by a state's across-the-board cut in payment rates as were the businesses in *Crosby*, which simply wanted to be able to bid for more work from Massachusetts. To the extent that Supremacy Clause challenges are limited to "regulated" entities, respondents certainly qualify under the criteria applied in *Crosby*.

The "regulated party" test, as construed by the Solicitor General, really amounts to a proxy for the kind of direct injury that would give a party standing. See *Bond*, 131 S. Ct. at 2363-2365 (holding that individuals with concrete injury have "standing to object to a violation of a constitutional principle that allocates power within government"). Here, there is no doubt that respondents and the patients they treat would be directly injured if California were permitted to implement its illegal rate cuts, and their Supremacy Clause challenge is therefore proper.

C. There Is No Basis For According Spending Clause Legislation Less Effect Under The Supremacy Clause

Nothing in the text of the Constitution limits the preemptive effect of a law depending upon the constitutional power Congress was exercising in adopting the statute. The preemptive effect under the Supremacy Clause of statutes enacted under the Spending Clause is the same as for laws enacted under any other constitutional power. Like all statutes, laws enacted under the Spending Clause are "supreme" over inconsistent state law.

Thus, this Court has repeatedly recognized the preemptive power of Spending Clause legislation, including Medicaid in particular, over conflicting state statutes. See, *e.g.*, *Dalton* v. *Little Rock Family Planning Servs.*, 516 U.S. 474, 476-478 (1996) (per curiam) (leaving in place district court injunction enjoining application of state law prohibiting expenditure of state funds for abortions in the case of incest or rape to the extent it "imposed obligations inconsistent with" the Hyde Amendment to the Medicaid Act, a spending bill); *Blum* v. *Bacon*, 457 U.S. 132, 145-146 (1982) (state program discriminating against AFDC beneficiaries preempted by federal regulation); *Carleson* v. *Remillard*, 406 U.S. 598, 604 (1972) (state rule denying assistance to children of military members preempted by AFDC); *cf. Pennsylvania Prot. & Advocacy, Inc.* v. *Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.). Similarly, in *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971), this Court held that an Illinois statute was "invalid under the Supremacy Clause" because it conflicted with the Aid to Families with Dependent Children program, a provision of the Social Security Act that

was adopted as Spending Clause legislation. See also *Ark. Dep't of Health & Human Servs.*, 547 U.S. at 268.

D. Congress Did Not Adopt An Exclusive Administrative System To Enforce Section 30(A) That Would Preclude Challenges Under The Supremacy Clause

Petitioners contend that permitting a cause of action under the Supremacy Clause is incompatible with "Congress's decision to centralize enforcement authority in HHS." Pet. Br. 26. There is nothing in Medicaid's administrative scheme, however, to suggest that Congress viewed private suits to set aside preempted state statutes as inconsistent with that scheme. Indeed, the Solicitor General disavows any suggestion that "Congress has displayed an intent" to preclude Supremacy Clause challenges. *See* U.S. Br. 32 n.12 (internal quotation omitted). The most the Solicitor General can say is that Section 30(A) would not be "a 'dead letter'" if Supremacy Clause challenges were not permitted. *Ibid.* But that is insufficient to support petitioners' argument for administrative exclusivity.

Petitioners cite this Court's decision in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011), in support of their argument, but that case is readily distinguishable. See Br. of Intervenor Resp. in No. 09-958 and California Pharmacists Resp. in No. 09-1158, at 41-42. In particular, the 340B program stands in stark contrast to Section 30(A). In *Astra*, participating pharmaceutical manufacturers each signed a *standard-form* Pharmaceutical Pricing Agreement ("PPA") with HHS. 42 U.S.C. 256b(a). The PPA specifies the maximum price at which manufacturers may sell their drugs to eligible providers, with this price being determined

using a uniform statutory formula. The Medicaid Act, by contrast, is almost unique in its lack of uniformity across the Nation. State Medicaid programs differ significantly from one another. The Medicaid Act permits states to develop unique benefit structures, delivery systems, and payment methodologies. Such a structure does not allow for enforcement under a single nationwide standard.

As previously discussed, *see supra*, 16-21, the administrative system for monitoring compliance with Section 30(A) is particularly lacking. The agency relies on the submission of state plan amendments as the only opportunity to assess rate cuts, and, even then, the agency is entirely dependent on the information submitted by the state. Even when the state ignores the administrative process, it is free to move ahead with its rate cuts with seeming impunity. That is hardly the type of "centraliz[ed] enforcement authority" that would preclude other available means of preventing states from enforcing laws that were contrary to Medicaid's mandates.

CONCLUSION

The Court should affirm the holding of the court of appeals.

Respectfully submitted.

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
LARRY S. GAGE
BARBARA D. EYMAN
CHARLES A. LUBAND
DAVID Z. GROSS
MATTHEW B. ARNOULD
ROPES & GRAY LLP

AUGUST 2011

APPENDIX
DESCRIPTION OF AMICI CURIAE

The American Health Care Association ("AHCA") is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improving the delivery of professional and compassionate care to more than 1.5 million citizens who live in skilled nursing facilities, subacute centers and homes for persons with developmental disabilities. In addition, AHCA's National Center for Assisted Living is a federation of state affiliates representing more than 2,700 non-profit and for-profit assisted living and residential care communities nationwide.

The American Hospital Association ("AHA") represents nearly 5,000 hospitals, health care systems, and other health care organizations, as well as 42,000 individual members. AHA members are committed to improving the health of the communities they serve including the more than 68 million children, poor, disabled and elderly individuals who rely on the Medicaid program for their health care.

The Association of American Medical Colleges ("AAMC") is a not-for-profit association representing all 135 accredited U.S. medical schools and nearly 300 major teaching hospitals and health systems. The AAMC represents 128,000 faculty members, 75,000 medical students, and 110,000 resident physicians. While the country's 273 major teaching hospitals represent just 6 percent of all hospitals and 23 percent of all hospital admissions, they account for one-quarter of all Medicaid discharges and over 40 percent of all hospital charity care. Additionally, Medicaid patients account for nearly one-sixth (17 percent) of healthcare

services provided by physician faculty practice groups. This rate is over 50 percent higher than the average for community-based multi-specialty groups.

The Catholic Health Association of the United States ("CHA") is the national leadership organization for the Catholic health ministry. CHA's more than 2,000 members operate in all 50 states and offer a full continuum of care, from primary care to assisted living. CHA works to advance the ministry's commitment to a just, compassionate health care system that protects life.

The Federation of American Hospitals ("FAH") is the national representative of investor-owned or managed community hospitals and health systems. FAH has nearly 1,000 member hospitals in 46 states and the District of Columbia. These members include rural and urban teaching and non-teaching hospitals and provide a wide range of acute, post-acute, and ambulatory services. Our hospitals have long been a critical part of the safety net serving vulnerable patients in urban and rural communities.

The National Association of Children's Hospitals ("N.A.C.H.") supports its 221 hospital members in addressing public policy issues. N.A.C.H.'s mission is to promote the health and well-being of children and their families through support of children's hospitals and health systems. Medicaid is the single largest insurer of children and the single largest payer for children's hospitals. On average, 50 percent of the patients at children's hospitals are enrolled in Medicaid.

The National Association of Community Health Centers is the national membership organization for federally-supported and federally-qualified health cen-

ters throughout the country. There are, at present, more than 1,200 health center entities nationwide, which serve as the health care homes to twenty (20) million persons at more than 8,000 sites. Approximately 40 percent of patients served by health centers are uninsured and approximately 35 percent (6.9 million) are Medicaid recipients.

The National Association of Public Hospitals and Health Systems ("NAPH") is comprised of some 140 of the nation's largest metropolitan safety net hospitals and health systems, committed to providing health care to all without regard to ability to pay. Over 35 percent of NAPH member net revenues are attributable to Medicaid.

The National Council for Community Behavioral Healthcare represents 1,950 behavioral healthcare organizations that provide treatment and rehabilitation for mental illnesses and addictions disorders to nearly six million adults, children and families in communities across the country.

Safety Net Hospitals for Pharmaceutical Access ("SNHPA") represents over 700 public and private non-profit hospitals and health systems throughout the U.S. that participate in the Public Health Service 340B drug discount program. SNHPA monitors, educates, and serves as an advocate on federal legislative and regulatory issues related to drug pricing and other pharmacy matters affecting safety-net providers.

RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, and 10-283

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, *Petitioner,*

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, *Petitioner,*

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, *Petitioner,*

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN DENTAL ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN ACADEMY OF FAMILY PHYSICIANS AND THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES EISEMAN, JR.
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
(215) 627-7100

LOUIS W. BULLOCK*
ROBERT M. BLAKEMORE
BULLOCK BULLOCK & BLAKEMORE
110 W. Seventh Street, Suite 707
Tulsa, OK 74119
(918) 584-2001
lbullock@bullock-blakemore.com

Counsel for Amici Curiae

*Counsel of Record

Library of Congress
Law Library

August 5, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

MEDICAID BENEFICIARIES MUST HAVE ACCESS TO THE COURTS TO ENFORCE THE EQUAL ACCESS PROVISION IN ORDER TO UPHOLD THE RULE OF LAW AND BECAUSE JUDICIAL ENFORCEMENT IS THE *ONLY* VIABLE MEANS TO REMEDY STATES' NONCOMPLIANCE WITH THE MEDICAID ACT 8

A. The Medicaid Act, Children's Health Care and the "Equal Access" Mandate 8

B. The Access Gap Between Congressional Promise and Actual Implementation 14

C. A Litigation Case Study of the Human Implications of States' Failures to Comply With the Medicaid Act 23

1. *Memisovski v. Maram* 25

2. *OKAAP v. Fogarty* 29

3. *Health Care for All v. Romney* 33

TABLE OF CONTENTS – Continued

Page

D. **The Availability of Judicial Remedies for Violations of the Equal Access Provision is Both Legally Mandated and Vital to Upholding the Rule of Law and Beneficiaries' Rights** 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Ark. Med. Soc'y v. Reynolds, 834 F. Supp. 1097 (E.D.Ark. 1992) 38

Ark. Med. Soc'y v. Reynolds, 6 F.3d 519 (8th Cir. 1993) 15

Clark v. Kizer, 758 F. Supp. 572 (E.D.Cal. 1990), *aff'd in relevant part sub nom., Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992) 15, 18, 22

Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003) 11

Florida Pediatric Society v. Dudek, 05-23037-CIV (S.D. Fla., Sept. 30, 2009) 13

Frew ex rel. Frew v. Hawkins, 540 U.S. 431 (2004) 9

Health Care for All v. Romney, 2005 WL 1660677 (D. Mass., July 14, 2005) 17, 24, 33, 34, 35

Long Term Care Pharm. Alliance v. Ferguson, 260 F. Supp. 2d 282 (D.Mass. 2003), *rev'd on other grounds, Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50 (1st Cir. 2004) 38

Marbury v. Madison, 5 U.S. 137 (1803) 37

Memisovski v. Maram, 2004 WL 1878332 (N.D. Ill., Aug. 23, 2004) ..... *passim*

Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty, 366 F. Supp. 2d 1050 (N.D. Okla. 2005), *rev'd OKAAP v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Olmstead v. United States, 277 U.S. 438 (1928).....37

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....35

Pennsylvania Pharmacists Ass'n v. Houstoun, 283 F.3d 531 (3rd Cir. 2002).....13, 35

Rosie D. v. Romney, 410 F. Supp. 2d 18 (D.Mass. 2006).....17

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004).....11

Salazar v. District of Columbia, 954 F. Supp. 278 (D.D.C. 1996).....7, 17

Truax v. Corrigan, 257 U.S. 312 (1921).....6, 36

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990).....13

RULES

Standards for Demonstrating Access to Covered Medicaid Services, 76 Fed. Reg. 26,342 (2011).....22

Sup. Ct. R. 37.6.....1

STATUTES

42 U.S.C. § 1396 .....*passim*

42 U.S.C. § 1396a(a)(8).....33

42 U.S.C. § 1396a(a)(10)(A)(i) 9

42 U.S.C. § 1396a(a)(10)(C).....9

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1396a(a)(17) 9

42 U.S.C. § 1396a(a)(30)(A) 4, 12, 35, 37

42 U.S.C. § 1396c 22, 35

42 U.S.C. § 1396d 9

42 U.S.C. § 1396d(r) 10

42 U.S.C. § 1396d(r)(5) 11

42 U.S.C. § 1397aa 13

42 U.S.C. § 1397aa(a) 13

42 U.S.C. § 1397ee(c)(2) 13

42 U.S.C. § 1397jj(c)(4) 13

42 U.S.C. § 1983 ..... 13, 17

Social Security Act, Title XIX, Pub. L. No. 89-97, 79 Stat. 343 (1965) 8

Pub. L. No. 90-248, 81 Stat. 821 (1967) ..... *passim*

Omnibus Budget Reconciliation Act (1989), Pub. L. No. 101-239, 1989 U.S.C.C.A.N. (103 Stat. 2106) 10

Children's Health Insurance Program ("CHIP"), Title XXI (1997) 5, 12, 19, 20, 21

CHIP Reauthorization Act, P.L. 111-3, 123 Stat. 8 (2009) 13

LEGISLATIVE HISTORY

H.R. Rep. No. 97-158 (1981) 13

H.R. Rep. No. 101-247 (1989), reprinted in 1989 U.S.C.C.A.N. 1906 ..... 5, 11, 12, 15, 22

TABLE OF AUTHORITIES – Continued

Page

Evaluating Pediatric Dental Care under Medicaid: Hearing before the Subcommittee on Domestic Policy of the House Committee on Oversight and Government Reform (Serial 110-8), 110th Cong. (May 2, 2007), *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:35772.pdf 21

OTHER AUTHORITIES

John Adams, Declaration of Rights in the Massachusetts Constitution of 1780, Article XXX 36

Cook County, Illinois, Geographic Information System, GIS History, http://www.cookcountygov.com/portal/server.pt/community/geographic_information_system/315/gis_history 25

Letter from HCFA Director to State Medicaid Directors, SMDL #01-010 (Jan. 18, 2001), https://www.cms.gov/smdl/downloads/smd011801a.pdf 14

Letter from AAFP, et al., to K. Sebelius (June 20, 2011), http://www.aafp.org/online/etc/medialib/aafp_org/documents/policy/fed/endorse-letters/medicaid062011.Par.0001.File.tmp/JointMedicaid062011.pdf 23

Medicaid State Reports, FY2008, http://www.aap.org/research/pdf08/US.pdf 14

TABLE OF AUTHORITIES – Continued

Page

Special Message to Congress by President Lyndon B. Johnson (Feb. 8, 1967), http://www.presidency.ucsb.edu/ws/index.php?pid=28438&st=Medicaid&st1=Johnson 9

U.S. Department of Health and Human Services, *Oral Health in America: A Report of the Surgeon General – Executive Summary* (2000) 20

U.S. GAO, GAO-11-624, *Medicaid and CHIP: Most Physicians Serve Covered Children but Have Difficulty Referring Them for Specialty Care* (2011), http://www.gao.gov/new.items/d11624.pdf 5, 19, 20, 21

U.S. GAO, GAO-08-1121, *Medicaid: Extent of Dental Disease in Children Has Not Decreased, and Millions Are Estimated to Have Untreated Tooth Decay* (2008) 20

SCHOLARLY AUTHORITIES

J. Bisgaier, et al., *Disparities in Child Access to Emergency Care for Acute Oral Injury,* 127 Pediatrics e1428 (2011) 18

J. Bisgaier & K. Rhodes, *Auditing Access to Specialty Care for Children with Public Insurance*, 364 New Eng. J. Med. 2324 (2011) 18

F. Cohen, *An Unfulfilled Promise of Medicaid Act: Enforcing Medicaid Recipients' Right to Health Care,* 17 Loy. Consumer L. Rev. 375 (2005) 25

TABLE OF AUTHORITIES – Continued

Page

S. Decker, *Medicaid Payment Levels to Dentists and Access to Dental Care Among Children and Adolescents,* 306 JAMA 187 (2011) 18

C. Iobst, et al., *Access to Care for Children with Fractures,* 30 J. Pediatric Orthopaedics, April/May 2010.....18

Medical Access Study Group, *Access of Medicaid Recipients to Outpatient Care*, N. Engl. J. Med., 330:1426-30 (1994).....19

D. Skaggs, et al., *Access to Orthopedic Care for Children with Medicaid Versus Private Insurance: Results of a National Survey,* 26 J. Pediatric Orthopaedics, May/June 2006.....18

A. Skinner & M. Mayer, *Effects of Insurance Status on Children's Access to Specialty Care: A Systemic Review of the Literature,* 7 BMC Health Serv. Res. 194 (2007) 18

INTEREST OF *AMICI CURIAE*

Amici are among the largest and most prominent medical and dental professional associations in the United States.[1] Collectively, the members of these professional associations provide medical and dental services to literally millions of patients covered by the Medicaid program. *Amici* are uniformly committed to promoting the betterment of public health and improved access to health and dental care for Medicaid recipients. They are profoundly interested in this case because its outcome will affect the ability of all Medicaid recipients to assure that they have access to medically necessary services as mandated by the Medicaid Act. States' failure to comply with the Medicaid Act's "equal access" provision has a well-documented and negative impact on patient care, often creating unnecessary risks and poor health outcomes. Restricting the availability of a remedy through the courts would leave the Congressional mandate of "equal access" an empty promise.

---

[1] Pursuant to Rule 37, letters of written consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amici* state that no counsel for either party has authored this brief in whole or in part. Funding for this brief, in part, has come from the Litigation Center of the AMA and the State Medical Societies, a coalition among the AMA and the State Medical Societies, whose purpose is to represent the organized medical profession in the courts. With the exception of the funding provided by the Litigation Center, no person or entity, other than *Amici*, has made any monetary contribution to the preparation or submission of this brief.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

American Dental Association ("ADA") is the world's largest professional association of dentists. The ADA is committed to the public's oral health, and to the ethics, science and professional advancement of dentistry. On behalf of its more than 155,000 members, the ADA occupies a prominent role in leading the profession through initiatives in advocacy, education, research and the development of standards that are essential for the safe, appropriate and effective delivery of oral healthcare. The Association is vitally concerned with access to care issues and serves as a principal advocate on issues affecting oral health.

The American Academy of Pediatrics ("AAP") is an Illinois not-for-profit corporation representing 60,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists. Founded in 1930, AAP has been a powerful voice for children's health through education, research, advocacy, and the provision of expert advice. Its mission is to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents,

and young adults. AAP is the largest professional association of pediatricians in the world.

The American Congress of Obstetricians and Gynecologists ("ACOG") is an Illinois not-for-profit corporation representing more than 50,000 obstetricians and gynecologists and residents in obstetrics and gynecology. ACOG is dedicated to the advancement of women's healthcare and to establishing and maintaining the highest possible standards of practice. ACOG also promotes policy positions on issues affecting the specialty of obstetrics and gynecology and supports quality health care for every woman throughout her life.

The American Academy of Family Physicians ("AAFP"), headquartered in Leawood, Kansas, is the national association of family doctors. Founded in 1947 as a not-for-profit corporation, its members are physicians and medical students from all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Uniformed Services of the United States. As part of its mission, the AAFP seeks to improve the health of patients, families, and communities by serving the needs of members and their patients with professionalism and dignity and by advocating for public health.

The American College of Emergency Physicians ("ACEP") is a nonprofit, voluntary professional and educational society of over 29,000 emergency physicians practicing in the United States and other countries. Founded in 1968, ACEP is the nation's oldest

and largest association of emergency physicians. ACEP fosters the highest quality of emergency medical care through the education of emergency physicians, other health care professionals, and the public; the promotion of research; the development and promotion of public health and safety initiatives; and the provision of leadership in the development of health care policy.

Many of *Amici*'s members care for Medicaid patients. Low Medicaid reimbursement rates impose an unfair burden on those members who accept these patients, and additional members of *Amici* would care for Medicaid patients if the reimbursement rates were not prohibitively low.

SUMMARY OF ARGUMENT

The "equal access" provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), mandates that states accepting federal Medicaid funds set provider reimbursement rates using "such methods and procedures" as necessary to assure, among other things, that payments are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." As a practical reality, however, the promise of "equal access" has been largely illusory for many of America's most vulnerable citizens. Federal courts, scientific researchers and governmental

bodies have consistently found a chasm between Medicaid and private insurance in the availability of needed health care services. Twenty years after the statutory enactment of the equal access mandate, discrepancies in access to care pervade. Members of the *Amici* see these discrepancies every day in their own practices. Whether it be a futile attempt to find a Medicaid-participating pediatric neurologist or dentist for a young patient or treating a Medicaid beneficiary in the emergency room who cannot find a primary care physician, there are constant reminders of the access crisis in our public health system.

There is a well-established and predictable correlation between Medicaid provider payments and physicians' willingness to treat Medicaid recipients. Indeed, the equal access provision was itself enacted with the common sense recognition that "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the [Medicaid] program." H.R. Rep. No. 101-247, at 390 (1989). The United States Government Accountability Office ("GAO") recently reported that for physicians who choose not to participate in Medicaid and the Children's Health Insurance Program ("CHIP"), *95%* are influenced by low provider reimbursement rates. *See* "Medicaid and CHIP: Most Physicians Serve Covered Children but Have Difficulty Referring Them for Specialty Care," GAO-11-624, at 18 (hereinafter

referred to as "2011 GAO Report").[2] Nevertheless, state officials have engaged in widespread violations of the federal equal access mandate, wholly failing to consider the effect of rates on access to care and services.

Federal administrative enforcement provides no viable solution to the access crisis because Congress delegated only limited, and draconian, enforcement powers. The primary administrative enforcement tool – a revocation of funding – is severe and would cause further harm. Thus, without judicial remedies, this crisis will remain and likely worsen. If the courthouse doors are closed, the very people the Medicaid Act was intended to serve will have no reasonable hope that "equal access" will have any true meaning in their lives.

Such a result would also violate fundamental rule of law principles. "'This is a government of laws and not of men,' 'No man is above the law,' are . . . maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Yet, without judicial remedies, state officials' violations of federal law will go unchecked in direct contravention of these principles, all while beneficiaries suffer.

---

[2] *Available at*: http://www.gao.gov/new.items/d11624.pdf.

It is, after all, the welfare of these beneficiaries that is of primary concern to the *Amici*. The real human suffering occasioned by noncompliance can be lost in a sterile discussion of the law. This is particularly true with the Medicaid Act, as it indisputably impacts the health of millions of low income Americans. This human importance of the Medicaid Act was aptly summarized by the United States District Court for the District of Columbia in *Salazar v. District of Columbia*, 954 F. Supp. 278, 281 (D.D.C. 1996):

> This case is about people – children . . . who are sick, poor, and vulnerable – for whom life, in the memorable words of poet Langston Hughes, "ain't been no crystal stair." It is written in the dry and bloodless language of "the law" – statistics, acronyms of agencies and bureaucratic entities, Supreme Court case names and quotes, official governmental reports, periodicity tables, etc. But let there be no forgetting the real people to whom this dry and bloodless language gives voice: anxious, working parents who are too poor to obtain medications or heart catheter procedures or lead poisoning screens for their children . . . Behind every "fact" found herein is a human face and the reality of being poor in the richest nation on earth.

If the equal access mandate is ever to fulfill its promise, these "real people" must have a voice in the courts.

In sum, if states are permitted to simply disregard the equal access provision with impunity, not only will violations of federal law go unchecked, but

millions of people, including millions of children, will continue to be placed at unnecessary risk of harm or even death. Judicial enforcement of the equal access provision is mandated as a matter of law and vital as a matter of fact. The *Amici* strongly urge this Court rule in favor of Respondents.

ARGUMENT

MEDICAID BENEFICIARIES MUST HAVE ACCESS TO THE COURTS TO ENFORCE THE EQUAL ACCESS PROVISION IN ORDER TO UPHOLD THE RULE OF LAW AND BECAUSE JUDICIAL ENFORCEMENT IS THE *ONLY* VIABLE MEANS TO REMEDY STATES' NONCOMPLIANCE WITH THE MEDICAID ACT

A. The Medicaid Act, Children's Health Care and the "Equal Access" Mandate

From very early on, it was evident that the Medicaid program was intended to improve health care for America's poor, with a particular emphasis on children's health. Title XIX of the Social Security Act, commonly known as the Medicaid Act, was first enacted in 1965. *See* Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amendment at 42 U.S.C. § 1396). The Medicaid program, as established by the Medicaid Act, is a cooperative federal-state program for furnishing and financing health care and services to certain low income families and individuals. States

that choose to participate in Medicaid are required to provide coverage to seven designated classes of "categorically needy" persons, with the option to extend coverage to other designated individuals, known as "medically needy." *See* 42 U.S.C. §§ 1396a(a)(10)(A)(i), (a)(10)(C), (a)(17) and § 1396d.

In 1967, Congress amended the Medicaid Act to impose the explicit and mandatory children's health care program – which has come to be known as Early and Periodic Screening, Diagnosis and Treatment, or "EPSDT" – upon every state choosing to accept federal Title XIX funds. *See* Pub. L. No. 90-248, 81 Stat. 821 (1967). As this Court has previously noted, "EPSDT programs provide health care services to children to reduce lifelong vulnerability to illness or disease." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433-34 (2004).

The children's health amendments were enacted amidst growing concerns about the lack of available pediatric health care and correlative effects on education. In his February 8, 1967 "Special Message to Congress," President Johnson stated:

> Recent studies confirm what we have long suspected. In education, in health, in all of human development, the early years are the critical years. Ignorance, ill health, personality disorder – these are disabilities often contracted in childhood: afflictions which linger to cripple the man and damage the next generation. Our nation must rid itself of this bitter inheritance. Our goal must be clear – to

> give every child the chance to fulfill his promise.
>
> * * *
>
> I am requesting increased funds for the "Medicaid" program, including . . . legislation to expand the timely examination and treatment of . . . poor children. . . .
>
> * * *
>
> We look toward the day when every child, no matter what his color or his family's means, gets the medical care he needs, starts school on an equal footing with his classmates, seeks as much education as he can absorb – in short, goes as far as his talents will take him.

Available at: http://www.presidency.ucsb.edu/ws/index.php?pid=28438&st=Medicaid&st1=Johnson. At this early stage in the life of Medicaid, the President and Congress placed special emphasis on low income children's health care, recognizing the potential for Medicaid to influence growth and development and to act as a catalyst for equality in health care and education. Unfortunately, however, after passage of the children's health amendments, many of the problems identified by President Johnson in 1967 persisted.

In 1989, Congress statutorily specified the required elements of EPSDT in 42 U.S.C. § 1396d(r). *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 1989 U.S.C.C.A.N. (103 Stat. 2106) 2262-63. In defining EPSDT services, Congress required

states to include four types of specific services: preventive screening, vision, dental, and hearing examinations. In addition to these specific preventive services, the statute mandates the provision of:

> [s]uch other necessary health care, diagnostic services, treatment, and *other measures described in subsection (a)* of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, *whether or not such services are covered under the State plan.*

42 U.S.C. § 1396d(r)(5)(emphasis added). In other words, the EPSDT mandate broadly requires that states furnish covered children (individuals under the age of 21) with *all medically necessary health care services. See, e.g., S.D. ex rel. Dickson v. Hood,* 391 F.3d 581, 590 (5th Cir. 2004); *Collins v. Hamilton,* 349 F.3d 371, 376 n. 8 (7th Cir. 2003).

As noted in the House Report generated in connection with the 1989 amendments, "[t]he EPSDT benefit is, in effect, the nation's largest preventative health care program for children." H.R. Rep. No. 101-247, 398-401, reprinted in 1989 U.S.C.C.A.N. 1906, 2124. Congress further left no doubt of its intent that children covered by Medicaid actually receive the services mandated by the EPSDT amendments. *Id.* at 2124-25. To this day, the Medicaid Act's EPSDT program is the primary source of necessary and vital health care services for millions of America's children.

Recognizing that the "eligibility expansions . . . for poor pregnant women . . . and poor children will not have their intended effect if physicians are not willing to treat Medicaid patients,"[3] Congress also enacted, as part of the 1989 amendments, the "equal access" provision. *See* 42 U.S.C. § 1396a(a)(30)(A). Consistent with the overall Congressional goal of improving children's health, the House Report indicates that the equal access provision was enacted, in large part, to address concerns over "inadequate" Medicaid participation of "physicians generally, and obstetricians and pediatricians in particular. . . ." H.R. Rep. No. 101-247 at 389 (1989). The House Committee found that Medicaid payment rates were an "important factor" in a physician's decision whether to accept Medicaid patients and was persuaded by hearing testimony that Medicaid payment rates had not kept pace with average community rates. *Id.* at 389-90. The House Report expresses a clear and common sense statement of the connection between provider payment rates and recipient access to health care services: "the Committee believes that, *without adequate payment levels, it is simply unrealistic to expect physicians to participate in the program.*" *Id.* at 390 (emphasis added).

In 1997, Congress created CHIP, Title XXI, to give states the option of covering additional uninsured children with family incomes up to 200% of the

---

[3] H.R. Rep. No. 101-247 at 390 (1989).

poverty level. *See* 42 U.S.C. §§ 1397aa; 1397jj(c)(4). Under CHIP, states are given flexibility to simply expand traditional Medicaid coverage. *See* 42 U.S.C. §§ 1397aa(a), 1397ee(c)(2). Funding for CHIP was renewed as part of the CHIP Reauthorization Act of 2009. *See* P.L. 111-3, 123 Stat. 8 (2009).

Judicial enforcement of substantive Medicaid Act provisions was contemplated by Congress. Eight years prior to the 1989 amendments, the House Committee Report on amendments to the Medicaid Act provided: "in instances where the States or the Secretary fail to observe these statutory requirements, the *courts would be expected to take appropriate remedial action*." H.R. Rep. No. 97-158 at 301 (1981) (emphasis added). As the Third Circuit later observed, "[t]his statement certainly suggests that the Committee anticipated *that some class of plaintiffs would be able to sue to enforce Section 30(A). . . .*" *Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 541 (3rd Cir. 2002) (en banc) (Alito) (emphasis added).[4] In the same vein, the Health Care

---

[4] The present case arises from circumstances in which the Supremacy Clause has been invoked to secure state compliance with the Medicaid Act's equal access mandate. The enforceability of the equal access mandate under 42 U.S.C. § 1983 is not at issue in this case and need not be decided by this Court. In any event, these *Amici* maintain that such a private right of action does exist pursuant to § 1983, and they are joined in that proposition by the district court holding in *Florida Pediatric Society v. Dudek*, 05-23037-CIV (S.D.Fla., Sept. 30, 2009) (Dkt. #672) (relying on *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)).

Financing Administration ("HCFA"), now the Centers for Medicare & Medicaid Services ("CMS"), later warned state Medicaid directors that "[i]nadequate Medicaid non-institutional provider rate structures may expose a state to serious litigation risk [with respect to equal access claims]." Letter from HCFA Director to State Medicaid Directors, SMDL #01-010, at 3 (Jan. 18, 2001), *Available at*: https://www.cms.gov/smdl/downloads/ smd011801a.pdf.[5]

B. The Access Gap Between Congressional Promise and Actual Implementation

There are approximately 61 million Medicaid enrollees in the United States, of whom 33 million are under age 21 and 31 million are under the age of 19. *See* Medicaid State Reports, FY 2008, published by CMS for Federal Fiscal Year 2008.[6] This is the equivalent of 37.6% of the total population of persons under age 21 and 38.9% of the total population under age 19. Despite the undeniable prominence and importance of Medicaid as a health insurer in America, there remain vast disparities between Medicaid and private insurance[7] in the availability of medically

---

[5] In the same letter, the HCFA Director indicates that as of January 2001, there had been 22 dental access cases in 18 States, and of those, 16 had been decided or settled favorably for the plaintiffs. *See* Letter from HCFA Director at 3.

[6] *Available at*: http://www.aap.org/research/pdf08/US.pdf.

[7] Courts have found that "the test for evaluating access is to compare the access of [beneficiaries] living in a specific

(Continued on following page)

necessary health care. Testimony from physicians, dentists and beneficiaries alike in litigation involving noncompliance with the Medicaid Act's equal access and EPSDT provisions paint the picture of a truly inferior health care system for Medicaid recipients. It is a system under which medically inappropriate delays in treatment are commonplace, putting patients, most especially children, at unnecessary risk.

Large percentages of recipients receive no mandatory preventive health screening examinations. Primary care providers struggle to find specialists willing to accept Medicaid enrolled patients. Medicaid enrolled children may wait upwards of one year to see a pediatric neurologist, or they may have to travel out-of-state to find an available specialist. Many Medicaid recipients have simply given up on finding *any* dentist who accepts Medicaid. There are even documented instances of young Medicaid recipients dying while awaiting necessary treatment. Regrettably, constrained, nonexistent access for Medicaid

---

geographic area [to] the access of [other] individuals in the same area [with] private or public insurance coverage." *Clark v. Kizer*, 758 F. Supp. 572, 576 (E.D.Cal. 1990), *aff'd in relevant part sub nom.*, *Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992) (citing H.R. Rep. No. 101-247, at 390-91). *See also Ark. Med. Soc'y v. Reynolds*, 6 F.3d 519, 527 (8th Cir. 1993) ("To suggest that Congress appropriated vast sums of money and enacted a huge bureaucratic structure to ensure that recipients of the federal Medicaid program have equivalent access to medical services as their uninsured neighbors (i.e., close to none) is ridiculous.")

recipients is no rarity. By contrast, the insured population does not usually face such access problems.

As one court summarized after a full trial on the merits of an equal access claim:

> Most doctors in Cook County [, Illinois] will either not see children on Medicaid or significantly limit the number of children on Medicaid that they will accept as patients.
>
> * * *
>
> A substantial number of children on Medicaid have had adverse health outcomes because they have not been able to see a pediatrician regularly due to their difficulty in finding a pediatrician. In addition, waiting times in specialty treatment clinics for the plaintiffs are long and oftentimes put patients in danger.
>
> * * *
>
> Medicaid recipients may have to travel great distances to find a dentist or pediatric provider willing to accept Medicaid, if they can find one at all. Children on Medicaid frequently seek care at emergency rooms because they cannot find a pediatrician willing to accept Medicaid.

Memisovski v. Maram, 2004 WL 1878332, *17-18 (N.D.Ill., Aug. 23, 2004).

Several other courts in geographically diverse locations have made similar findings over the years. *See, e.g., Oklahoma Chapter of the American Academy*

of Pediatrics ("OKAAP") v. Fogarty, 366 F. Supp. 2d 1050, 1107 (N.D.Okla. 2005), *rev'd, OKAAP v. Fogarty,* 472 F.3d 1208, 1215 (10th Cir. 2007) ("[T]he lack of physician participation in Medicaid forces class members either to wait for unreasonable periods of time to receive needed care or to travel long distances to find Medicaid participating providers, putting these children at risk of harm or even death.");[8] *Rosie D. v. Romney,* 410 F. Supp. 2d 18, 23 (D.Mass. 2006) ("At present, thousands of needy . . . children [diagnosed with serious emotional disturbances] lack comprehensive assessments; treatment occurs haphazardly, with no single person or entity providing oversight and ensuring consistency"); *Health Care for All v. Romney,* 2005 WL 1660677, *10 (D.Mass., July 14, 2005) ("Plaintiffs' evidence shows that [Medicaid] enrollees encountered extraordinary difficulty in obtaining timely dental services"); *Salazar v. District of Columbia,* 954 F. Supp. 278, 304 (D.D.C. 1996)

---

[8] The Tenth Circuit Court of Appeals reversed the *OKAAP* district court's determination that the defendants violated the equal access mandate on purely legal grounds, determining that the plaintiffs had no right to enforce the equal access provision pursuant to 42 U.S.C. § 1983. *OKAAP,* 472 F.3d at 1215. The Tenth Circuit did *not* challenge the district court's underlying findings of fact. To the extent that the Tenth Circuit addressed the findings at all, it conceded that the district court "perhaps correctly" concluded that the "low rates of reimbursement reduce the number of providers available to Medicaid beneficiaries, and in turn increase the time Medicaid beneficiaries must wait to receive medical services from available providers. . . ." *Id.* at 1214; *see also id.* at 1209 (noting "system-wide delays in treatment of Medicaid beneficiaries").

("Plaintiffs have produced significant evidence to show that Defendants have failed to deliver EPSDT services to eligible children"); *Clark v. Kizer,* 758 F. Supp. 572, 576 (E.D.Cal. 1990), *aff'd in relevant part sub nom., Clark v. Coye,* 967 F.2d 585 (9th Cir. 1992) ("The undisputed facts in this case establish that less than 40% of the licensed dentists in the state treat any Denti-Cal recipients."). All of these findings, of course, were made prior to the additional strains on the Medicaid system that have arisen from the current economic downturn.

Published scientific studies also consistently confirm that access to health care and dental services is generally poor for Medicaid recipients when compared to access enjoyed by the privately-insured population. *See, e.g.,* J. Bisgaier et al., *Disparities in Child Access to Emergency Care for Acute Oral Injury,* 127 Pediatrics e1428 (2011); J. Bisgaier & K. Rhodes, *Auditing Access to Specialty Care for Children with Public Insurance,* 364 New Eng. J. Med. 2324 (2011); S. Decker, *Medicaid Payment Levels to Dentists and Access to Dental Care Among Children and Adolescents,* 306 JAMA 187 (2011); C. Iobst et al., *Access to Care for Children with Fractures,* 30 J. Pediatric Orthopaedics April/May 2010 at 244; A. Skinner & M. Mayer, *Effects of Insurance Status on Children's Access to Specialty Care: A Systemic Review of the Literature,* 7 BMC Health Serv. Res. 194 (2007); D. Skaggs et al., *Access to Orthopedic Care for Children with Medicaid Versus Private Insurance: Results of a National Survey,* 26 J. Pediatric Orthopaedics

May/June 2006, at 400; Medical Access Study Group, *Access of Medicaid Recipients to Outpatient Care,* 330 New Eng. J. Med. 1426-30 (1994). Similar studies have been presented by expert witnesses, admitted into evidence, and relied upon by courts in finding violations of the "equal access" provision. For instance, the United States District Court for the Northern District of Oklahoma relied upon survey results showing that only 34% of Oklahoma's pediatricians accepted all new Medicaid patients, while 69% accepted all new privately insured patients. *OKAAP*, 366 F. Supp. 2d at 1063; *see also Memisovski,* 2004 WL 1878332 at *13.

Recent data demonstrate that Medicaid's access conundrum is widespread and continuing. The 2011 GAO Report documents the results of a nationwide study of children's access to care under Medicaid and CHIP, including information on physicians' willingness to serve children covered under these public health care programs. *See* 2011 GAO Report at 1.[9] Some of the findings are alarming. For instance, GAO found that about 80% of physicians are accepting all

---

[9] Medicaid and CHIP are closely related public health programs. As GAO states, both Medicaid and CHIP are "joint federal-state health care programs for certain low income individuals" which "play a critical role in addressing the health care needs of children." 2011 GAO Report at 1. Furthermore, there are approximately five times as many children covered under Medicaid as children covered under CHIP. *Id.* at 4. Thus, data concerning access to care with respect to Medicaid and CHIP combined is indicative of access under Medicaid alone.

privately insured children as new patients, while less than 50% accept all Medicaid and CHIP children. *See* 2011 GAO Report at 10. GAO further estimates that 84% of participating physicians experience difficulty in referring Medicaid and CHIP children to specialists, compared with 26% for privately insured children. *Id.* at 20. Most dramatically, GAO specifically reports that while 34% of physicians experience "great difficulty" in referring Medicaid and CHIP children, only 1% of physicians experience such difficulty in referring privately insured children. *Id.* at 21.

In 2000, the Surgeon General reported that "Medicaid has not been able to fill the gap in providing dental care to poor children" and that "[f]ewer than one in five Medicaid children received a single dental visit in a recent year-long study." U.S. Department of Health and Human Services, *Oral Health in America: A Report of the Surgeon General – Executive Summary* (2000). By 2008, the situation had not significantly improved. GAO found that dental disease and inadequate receipt of dental care remained a serious problem for children in Medicaid, with only about one in three such children receiving *any* dental care. *See* GAO, "Medicaid: Extent of Dental Disease in Children Has Not Decreased, and Millions Are Estimated to Have Untreated Tooth Decay," GAO-08-1121, at 4 (2008). By contrast, more than one-half of privately insured children had received dental care. *Id.*

The lack of dental access can have tragic consequences. In 2007, a 12-year-old Medicaid recipient in Maryland – Deamonte Driver – died from a brain infection caused by untreated tooth decay. *See Evaluating Pediatric Dental Care under Medicaid: Hearing before the Subcommittee on Domestic Policy of the House Committee on Oversight and Government Reform* (Serial 110-8), 110th Cong., at 2-4; 13-19 (May 2, 2007).[10] Prior to his death, Deamonte's mother had unsuccessfully attempted to find a Medicaid-participating dentist to provide preventive dental care for her sons. *Id.* After Deamonte began experiencing severe headaches, he was diagnosed with a sinus infection and later rushed to the hospital. *Id.* at 13, 19. Over a period of six weeks in the hospital, Deamonte valiantly fought through two brain surgeries and a tooth extraction, only to suddenly pass away on February 25, 2007. *Id.* at 19.

Tellingly, GAO estimates that for providers who choose not to participate in Medicaid and CHIP, 95% are influenced by low provider reimbursement rates. *See* 2011 GAO Report at 18. While greatly concerning, this finding comes as little surprise to the *Amici*. For many years, provider payment rates have been linked to physicians' willingness to participate in Medicaid. Fundamentally, the Medicaid Act's equal access provision was enacted over two decades ago with the

---

[10] *Available at*: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:35772.pdf.

recognition that physicians will simply not participate in Medicaid if payments are inadequate. *See, e.g.*, H.R. Rep. No. 101-247 at 390 (1989). Since enactment, several federal courts have determined that particular states' Medicaid provider rates were insufficient to satisfy the equal access mandate. *See, e.g., Clark,* 758 F. Supp. at 577 ("The uncontroverted evidence in the record before the court . . . establishes that the present rates are not even adequate to meet overhead, let alone allowing for some marginal profit"); *Memisovski,* 2004 WL 1878332 at *45 ("Employees of the [Illinois Department of Public Aid] freely admit that rates are low and not very attractive and are set without regard to the effect such rate-setting will have on access. . . ."); *OKAAP*, 366 F. Supp. 2d at 1106 ("The record in this case demonstrates that [Oklahoma Health Care Authority] has frequently set rates below the levels which OHCA admits are adequate to assure there are enough providers to serve Medicaid enrolled children. . . .").

The continuing access crisis under Medicaid is due, in large part, to the draconian nature of the administrative enforcement mechanism. As noted *supra*, the only true enforcement tool available to the Secretary of Health and Human Services ("HHS") – a revocation of funding – would further harm the very beneficiaries the Medicaid Act was intended to protect. *See* 42 U.S.C. § 1396c.[11] By contrast, private

[11] The current administration recently proposed a Medicaid "equal access" rule. *See* Standards for Demonstrating Access to

(Continued on following page)

lawsuits offer the possibility of increased state funding, with a real benefit to recipients in need. While such increases have actually been achieved through private legal actions, no increases have ever been achieved through HHS enforcement. Private litigation offers the only realistic prospect of an effective remedy for states' often flagrant violation of the Medicaid Act. Thus, the availability of these lawsuits is crucial, and this Court ought not diminish this necessary vehicle for achieving the Congressional purpose.

C. A Litigation Case Study of the Human Implications of States' Failures to Comply With the Medicaid Act

As foreseen by Congress and later warned of by HCFA, over the years since the 1989 amendments,

---

Covered Medicaid Services, 76 Fed. Reg. 26,342-62 (2011). However, the proposed rule calls for no concrete guidelines and states the administration's intent that any final rule would not directly "require States to adjust payment rates." *Id.* at 26,344. It is also unclear, whether or how, the administration plans to enforce any such equal access rule. Indeed, neither the word "enforcement" nor "enforce" appears anywhere in the proposed rule. As several of the *Amici* recently summarized in comments on the proposed rule, "[w]ithout enforcement and comprehensiveness, CMS will have missed the opportunity to ensure that children and other populations covered under Medicaid have real access to care." Letter from AAFP, et al. to K. Sebelius (June 20, 2011), *Available at*: http://www.aafp.org/online/etc/medialib/aafp_org/documents/policy/fed/endorse-letters/medicaid062011.Par.0001.File.tmp/JointMedicaid062011.pdf.

many Medicaid beneficiaries have brought actions to enforce the equal access provision and/or EPSDT provisions of the Medicaid Act. Dealing with a broken system and with nowhere else to turn for relief, desperate beneficiaries and courageous physicians have looked to the courts to compel states' compliance. In the relatively rare instances when one of these cases has gone to a full trial on the merits, the courts' findings of fact have vividly illustrated the "real world" implications of a noncompliant Medicaid program. Courts have found large-scale failures to provide necessary services to those in need, medically inappropriate and dangerous delays in treatment and demonstrable disparities in access to needed care.

For the purposes of this Brief, the *Amici* focus on three such cases – *Memisovski v. Maram*, 2004 WL 1878332 (N.D.Ill., Aug. 23, 2004), *OKAAP v. Fogarty*, 366 F. Supp. 2d 1050 (N.D.Okla. 2005), and *Health Care for All v. Romney*, 2005 WL 1660677 (D.Mass., July 14, 2005)[12] – which detail, sometimes tragically, the very reasons it is absolutely vital that Medicaid beneficiaries (and perhaps health care providers) have access to the courts.

---

[12] Unlike the underlying cases at bar, which were brought pursuant to the Supremacy Clause, *Memisovski*, *OKAAP* and *Health Care for All* were brought pursuant to 42 U.S.C. § 1983.

1. *Memisovski v. Maram*

The *Memisovski* case was a class action brought on behalf of all Medicaid-eligible children in Cook County, Illinois. Cook County is the second most populous county in the United States.[13] By the time the *Memisovski* case was tried, approximately 600,000 Cook County children were on Medicaid. *See Memisovski,* 2004 WL 1878332 at *11.

After the trial was completed, the *Memisovski* court issued its ruling in favor of the plaintiffs, bolstered by extensive findings of fact and conclusions of law. *Id.* at *11-56. The court's findings of fact read like a veritable laundry list of everything that could possibly go wrong with a state's Medicaid system. And it is apparent that much of the evidence put on by the *Memisovski* plaintiffs, which showed blatant and systemic violations of the equal access and EPSDT mandates, was not meaningfully contested by the Illinois state official defendants. *See, e.g., id.* at *45 ("defendants have no knowledge regarding the state of access for Medicaid-enrolled children in Cook County and have never tried to learn what the level of access might be. . . .")[14]

---

[13] *See*: Cook County, Illinois, Geographic Information System, GIS History, http://www.cookcountygov.com/portal/server.pt/community/geographic_information_systems/315/gis_history.

[14] In fact, as lead counsel for the *Memisovski* plaintiffs represented, defendants initially took the position they were complying with the Medicaid Act because access to care was *no worse* in Illinois than in other industrial states. *See* F. Cohen, *An Unfulfilled Promise of Medicaid Act: Enforcing Medicaid*

(Continued on following page)

The *Memisovski* court's findings chronicle both statistical and anecdotal evidence of a Medicaid system in ruin. The findings exposed a system that often provided no health care at all, let alone "equal access." As noted above, the court determined that most physicians in Cook County either did not see Medicaid-enrolled children at all, or they significantly limited their Medicaid practices. *See Memisovski*, 2004 WL 1878332 at *17. This lack of available providers had a predictable negative effect on patient care. For instance, the court found that approximately 90% of Medicaid-enrolled children in Cook County had never received a vision examination, 80% had never received a hearing examination and 75% had never received a dental examination. *Id.* at *30. The court relied upon expert analysis showing that approximately one-third of the pediatric Medicaid population had never received "any preventive health care at all." *Id.* at *23.

Recipients' Right to Health Care, 17 Loy. Consumer L. Rev. 375, 390 (2005). What is more, according to counsel, defendants made this argument without conducting any analysis as to whether any of these other "industrial states" were complying with the Medicaid Act. *Id.* Given the Illinois defendants' attitude about compliance, the disintegration of the Medicaid system in Cook County should have come as no surprise. Such an attitude on the part of state Medicaid agencies is not uncommon and further exemplifies the need for enforcement in the courts. Ironically, though, there is no reason to doubt that this assertion by defense counsel was substantively correct – access to care under the Illinois Medicaid program may well have been no worse than in other industrial (as well as non-industrial) states.

"[M]any of the physicians testified that Medicaid children frequently use the emergency room as a source of primary care because they simply have nowhere else to go." *Id.* at 44. Dr. Steven Lelyveld, from the University of Chicago Hospitals' pediatric emergency room, testified that Medicaid-enrolled children with asthma, gastroenteritis, flu and diabetes "frequently presented [at the emergency room] with more aggravated or serious symptoms . . . as a result of lack of primary care." *Id.* Dr. Steven Krug, head of the emergency room at Children's Memorial Hospital in Chicago, testified that Medicaid patients in the emergency room frequently arrived with "conditions that privately-insured patients do not typically have and which reflect a lack of primary care, including untreated bone fractures or advanced asthmatic conditions." *Id.*

The *Memisovski* court also relied on the testimony of Medicaid recipients, such as Yesinia Rodriguez. Ms. Rodriguez testified concerning the extraordinary difficulty she had in locating a physician in Cook County who would accept Medicaid. When she called the Illinois hotline for a physician referral, she was given the names of approximately ten different doctors, all of whom practiced more than 30 miles away and *none* of whom accepted Medicaid. *Memisovski*, 2004 WL 1878332 at *18. When Ms. Rodriguez called the hotline back, she was given contact information for 20 more doctors. *Id.* Once again, however, *not one* of these doctors accepted Medicaid. *Id.*

The court's findings concerning Illinois' Medicaid payment rates explained why access to needed care was so inadequate for Cook County's Medicaid population. Indeed, the Illinois defendants admitted that Medicaid rates were low and unattractive and that the rates were set without any consideration of the effect on access. *Id.* at *45. The court found that Medicaid rates in Illinois were approximately 50% of Medicare rates[15] and that "[a] pediatrician practice relying solely on Medicaid beneficiaries' maximum reimbursements could not survive since Medicaid pays nearly 10% less than the median practice costs." *Id.* at *12-13. In summarizing the overwhelming evidence put on by the plaintiffs, the *Memisovski* Court stated:

> Testimony showed that Medicaid-enrolled children face conditions such as longer waiting times for care . . . , a more limited population of providers willing to provide care . . . , and multiple trips to the doctor for services which could be addressed in one visit. . . . All in all, the doctors painted a picture of Medicaid-enrolled patients being afforded a significantly lesser degree of access to care than that enjoyed by privately-insured children.

Memisovski, 2004 WL 1878332 at *43. Two generations after President Johnson publicly envisioned a

---

[15] Medicare rates are an important benchmark because Medicare rates are set to allow a physician to recover overhead costs and a modest profit. *Id.* at *12.

day when, through Medicaid, "every child, no matter what his color or his family's means, gets the medical care he needs," the Medicaid system in one of most populous areas in the United States was in complete collapse.

2. *OKAAP v. Fogarty*

In *OKAAP*, as in *Memisovski*, the plaintiffs were successful in proving wholesale violations of the equal access mandate. And in the each of these cases, the district court issued detailed findings of fact evincing noncompliant and badly broken Medicaid programs. The *OKAAP* district court's findings and conclusions meticulously set out the Oklahoma defendants' continuing, serious and knowing failures to assure that eligible children received health care services as required by the Medicaid Act. In determining the defendants had violated the equal access provision, the *OKAAP* court summarized:

> The testimony from providers and parents of class members alike was that recipients have great difficulty accessing needed health care services in Oklahoma. As plaintiffs established, the lack of physician participation in Medicaid forces class members either to wait for unreasonable periods of time to receive needed care or to travel long distances to find Medicaid participating providers, putting these children at *risk of harm or even death*.

> . . . The testimony at trial also demonstrated that providers are widely opting out of the Medicaid program or restricting their Medicaid caseloads.
>
> . . . Finally, defendants admitted at trial that reimbursement rates are inadequate and that the equal access provision is being violated.

OKAAP, 366 F. Supp. 2d at 1107 (emphasis added).

The evidence in the *OKAAP* case brought to light troubling facts concerning the state of health care for Oklahoma's young Medicaid population. For instance, the court found that one young Medicaid patient died while awaiting a delayed airway surgery. *OKAAP*, 366 F. Supp. 2d at 1100. At the time of the class certification hearing, named plaintiff Katelyn W. had been unable to secure a medically necessary prosthetic shoe insert to replace her amputated foot. *Id.* at 1088. The primary care physician ("PCP") of Jacob H., another named plaintiff, had attempted, without success, for approximately three years to find *any* Medicaid-participating facility to perform a necessary diagnostic sleep study. *Id.*

In this regard, the court found generally that "recipients in Oklahoma often experience long delays in obtaining appointments for provision of medically necessary care." *OKAAP*, 366 F. Supp. 2d at 1079. Access to neurological care was an area of particular concern. Pediatric Medicaid patients in Oklahoma City with seizure disorders were forced to wait

"*around a year* to be seen by a pediatric neurologist." *Id.* at 1067 (emphasis added). Some of these patients had poorly controlled seizures, and, as the court found, without the prompt care of a neurologist the seizures would negatively impact school performance, development, behavior, and the "'overall medical well-being'" of these children. *Id.* (quoting from Tr. Vol. I at 54:7-16). The court particularly noted the chilling account of one parent who told of being forced to drive her daughter for four hours to see a pediatric neurologist, and her daughter's experiencing a severe seizure *en route*. *Id.*

At the time of trial, office-based ear, nose and throat ("ENT") specialists in Oklahoma simply refused to treat children on Medicaid. *OKAAP*, 366 F. Supp. 2d at 1067-68. "The lack of Medicaid participation by private practice ENT specialists . . . created 'almost a crisis situation' at the [Oklahoma University] Medical Center in Oklahoma City." *Id.* at 1068 (internal quotation omitted). Dr. Richard Ranne, a pediatric thoracic surgeon in Tulsa, described access to orthopedists who accept Medicaid as "extremely poor." *Id.* at 1069. The court noted the testimony of another Tulsa pediatrician regarding "a six-week ordeal his office encountered attempting, without success, to secure an orthopedic consult for a four-year-old girl with a fractured toe." *Id.* at 1069.

Statistical and anecdotal evidence alike showed significant disparities between access to care under Medicaid when compared with access under private

plans. Survey data showed that only 34% of Oklahoma's pediatricians participated fully in the Medicaid program, while 69% of Oklahoma's pediatricians accepted all new privately insured patients. *OKAAP*, 366 F. Supp. 2d at 1063. The many physicians who testified at trial corroborated these statistics. A pediatric neurologist, who had ceased participation in Medicaid, testified that children on Medicaid did not have the same access to neurological services provided to children with private insurance "because of low or nonexistent Medicaid reimbursement." *Id.* at 1067. Another pediatrician testified that while access to ENT specialists was extremely poor for Medicaid patients, children with private insurance had "no problems" accessing ENT services. *Id.* at 1068.

Consistent with the results of the recent national survey conducted by the GAO, the *OKAAP* court found that approximately ninety-three percent (93.2%) of Oklahoma's pediatricians reported that low reimbursement is a "very important" reason they would limit their participation in the Medicaid program. *OKAAP*, 366 F. Supp. 2d at 1075. From 1995 through December 31, 2003, provider reimbursement under Oklahoma's Medicaid fee-for-service schedule never exceeded 72% of Medicare. *Id.* at 1059. By contrast, under commercial plans, Oklahoma physicians were reimbursed at rates of 130% to 180% of Medicare. *Id.* at 1060. As the CEO of Oklahoma's Medicaid agency candidly admitted, Oklahoma's Medicaid physician reimbursement rates

"are low, were low, and that this is a factor that makes it difficult to recruit physicians." *Id.* at 1075.

3. *Health Care for All v. Romney*

The *Health Care for All* case involved claims that responsible officials had failed to meet the dental needs, to the extent required by the Medicaid Act, of children and adults enrolled in Massachusetts' Medicaid program.[18] *See* 2005 WL 1660677. The court's findings revealed an absence of adequate access to mandatory dental care under Massachusetts' Medicaid program. *See, e.g., id.* at *2-7.

First, the court found that "[e]ach testifying plaintiff confronted hardships in identifying [Medicaid] participating dentists, obtaining appointments for dental care and receiving quality services." *Id.* at *2. One plaintiff, Ms. Curtis, worked diligently to find a single dental office willing to accept her Medicaid-enrolled children, only to subsequently discover that single dental office had closed its doors to Medicaid beneficiaries. *Id.* at *2. By the time Ms. Curtis had put together the money to pay out of pocket for her children to be seen by a solo practitioner, her sons had over 13 cavities. *Id.* Another young Medicaid beneficiary suffered an infected molar and could not

---

[18] While the allegations made by the plaintiffs in *Health Care for All* factually resemble an equal access claim, the plaintiffs brought their claims under the Medicaid Act's "reasonable promptness" provision, 42 U.S.C. § 1396a(a)(8).

attend school, eat or sleep due to the pain until a Medicaid-participating dentist could be located to extract the tooth. *Id.* at *3. The court found that a mother searched for two months to identify an oral surgeon who accepted Medicaid and would perform extractions for her son whose permanent teeth were not developing properly. *Id.*

Second, the court relied upon statistical evidence that *86%* of licensed dentists in Massachusetts refused to accept Medicaid patients. *Id.* at *3.

Third, and importantly, the *Health Care for All* court compared access to dental care under Medicaid with access under Delta Dental, a commercial plan. *See, e.g., id.* at *5. Specifically, the Commonwealth defendants' own statistics showed that only slightly more than 30% of Medicaid-enrolled children received at least one dental visit each year for the years 2001, 2002, and 2003. *Id.* In contrast, 80 to 85% of children covered by Delta Dental had accessed such dental care. *Id.*

Fourth, the court found a clear connection between low Medicaid reimbursement and inadequate dental care. At the time of trial, Medicaid dental rates were "dramatically below . . . market levels" such that Medicaid-participating dentists could cover only about 75% of their costs. *Id.* at *4. In particular, plaintiffs established that Medicaid reimbursement rates were "so low that private dentists could not afford to treat enrollees who, thus, either received dental care only after much delay or not at all." *Id.* at *11.

D. The Availability of Judicial Remedies for Violations of the Equal Access Provision is Both Legally Mandated and Vital to Upholding the Rule of Law and Beneficiaries' Rights

Congress expected that courts would enforce § 1396a(a)(30)(A). *See, e.g., Pennsylvania Pharmacists Ass'n,* 283 F.3d at 541 (then-Judge Alito discussing legislative history and observing that "statement certainly suggests that the Committee anticipated that some class of plaintiffs would be able to sue to enforce Section 30(A). . . ."). The grievous deficiencies within the Illinois, Oklahoma and Massachusetts Medicaid programs would likely never have been addressed had the *Memisovski, OKAAP* and *Health Care for All* cases not been filed and prosecuted. All indications are that, without court intervention, the Medicaid programs in those states would have simply languished in perpetual noncompliance while beneficiaries suffered without recourse. As shown, the only effective enforcement tool available to the Secretary of HHS – revocation of a state's federal funding (*see* 42 U.S.C. § 1396c) – is the administrative equivalent of a nuclear bomb. "[A] funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 52 (1981) (White J., dissenting). That is, were the Secretary to revoke funding of a State's Medicaid program for noncompliance with the equal access mandate, recipients would lose health care coverage altogether, turning a crisis into a catastrophe.

This leaves the federal courts as the only meaningful option. With no access to the courts, suffering beneficiaries will have no viable means for remedial relief. In addition, those state officials responsible for noncompliant Medicaid programs would never be called to task in contravention of fundamental rule of law principles. The classic American formulation of these principles can be traced back to John Adams and his Declaration of Rights in the Massachusetts Constitution of 1780. Article XXX applied the doctrine of separation of powers to the government of the Commonwealth " . . . to the end it may be a government of laws and not of men." This Court has since broadly recognized this "maxim." *Truax*, 257 U.S. at 332.

The rule of law doctrine applies with particular force to governmental bodies – even states – whose very existence depends on this country's laws and the respect of the population for those laws. Justice Brandeis eloquently stated the general principle:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. . . . Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). In *Marbury v. Madison*, Justice Marshall famously addressed the subordination of public officials to the rule of law as follows: "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." 5 U.S. 137, 166 (1803) (emphasis added).

The equal access mandate is not being observed scrupulously. On the contrary, it is evident that the mandate is being violated by states on a wide scale. And, at the very least, the equal access provision of § 1396a(a)(30)(A) assigns a duty of performance to the states which is necessary in assuring that individual rights – such as the right to receive medically necessary services under the EPSDT provisions – are realized. Without an adequate network of health care providers willing to accept Medicaid patients, recipients will not receive the services guaranteed by the Medicaid Act; and without adequate payments to providers, there will not be enough providers willing to accept Medicaid patients. The specific duties assigned to responsible governmental officials by the equal access provision are central to beneficiaries' rights and well-being. If recipients are barred from holding government officials to account for shirking their legal duties, those officials will escape the rule of law, and suffering recipients will be denied the "right to resort to the laws of this country for a remedy" as envisioned by the *Marbury* Court.

The remedial powers of the federal courts offer genuine hope to the millions of Medicaid beneficiaries without access to prompt and quality medical or dental services. In particular Medicaid Act cases where plaintiffs have been successful in prosecuting or settling their claims, courts have been able to construct effective remedial orders. Courts have issued preliminary injunctions in equal access cases to prevent Medicaid payment rate cuts where states have failed to make findings as to the impact that such cuts would have on access. *See, e.g., Ark. Med. Soc'y v. Reynolds,* 834 F. Supp. 1097, 1103 (E.D.Ark. 1992); *Long Term Care Pharm. Alliance v. Ferguson,* 260 F. Supp. 2d 282 (D.Mass. 2003), *rev'd on other grounds, Long Term Care Pharm. Alliance v. Ferguson,* 362 F.3d 50 (1st Cir. 2004). These preliminary injunctions curtailed potentially disastrous cuts in Medicaid provider rates. Had these courts not been empowered to act, there would have been no remedy at all.

CONCLUSION

All of the considerations discussed above weigh in favor of a right to sue, because (a) violation of the equal access requirement has been epidemic since the statute was passed 20 years ago, (b) the federal government has shown not the slightest interest in enforcing the law, and (c) even if, hypothetically, the federal government were interested in enforcing the law, its means of doing so would probably be ineffective in meeting the overall Medicaid goal of providing

medical care for the poor and needy. If it is otherwise, the rule of law will be eroded, and "equal access" will remain an unfulfilled promise.

Respectfully submitted,

JAMES EISEMAN, JR.
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
(215) 627-7100

LOUIS W. BULLOCK*
ROBERT M. BLAKEMORE
BULLOCK BULLOCK & BLAKEMORE
110 W. Seventh Street, Suite 707
Tulsa, OK 74119
(918) 584-2001
lbullock@bullock-blakemore.com

Counsel for Amici Curiae

Counsel of Record

August 5, 2011

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 26 2011
OFFICE OF THE CLERK

Nos. 09-958, 09-1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., a Nonprofit Corporation, *et al.*

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

CALIFORNIA PHARMACISTS ASS'N, *et al.*

TOBY DOUGLAS, Director, Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*,

On Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

BRIEF FOR APA WATCH AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Lawrence J. Joseph
1250 Connecticut Ave, NW, Ste 200
Washington, DC 20036
Tel (202) 669-5135
Fax (202) 318-2254
Email ljoseph@larryjoseph.com

Library of Congress
Law Library

QUESTION PRESENTED

Under the Medicaid Act, a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of ... [Medicaid] services and ... assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available ... at least to the extent that such care and services are available to the general population." 42 U.S.C. §1396a(a)(30)(A). The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), concluded that this provision is not privately enforceable by providers or beneficiaries under 42 U.S.C. §1983, *inter alia*, because it does not confer any "rights" on providers or beneficiaries, and because it requires balancing of indeterminate and potentially conflicting policy objectives that are "ill-suited" for judicial enforcement. Nonetheless, the Ninth Circuit held that such considerations were irrelevant in the present cases, where respondents are proceeding under the Supremacy Clause rather than under §1983.

The question presented is:

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce §30(A) by asserting that the provision preempts a state law that may reduce payments to providers?

TABLE OF CONTENTS

Question Presented i
Table of Contents ii
Table of Authorities iii
Interest of *Amicus Curiae* 1
Factual and Legal Background 2
Enforcement of Spending-Clause Legislation 2
Medicaid Statute 2
Federal Common Law 3
Summary of Argument 5
Argument 7
I. California Cannot Waive the Providers' Lack of Standing 7
II. Providers Cannot Litigate the Injuries of HHS.. 8
III. Third-Party Beneficiaries Lack Standing to Enforce Rights that Have Not Vested in the Promisee 9
Conclusion 14

TABLE OF AUTHORITIES

Cases

BAII Banking Corp. v. UPG, Inc., 985 F.2d 685 (2d Cir. 1993) 11

Barnes v. Gorman, 536 U.S. 181 (2002) 2

Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) 2

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 3, 4

Chen v. Chen, 586 Pa. 297, 893 A.2d 87 (Pa. 2006) 12

Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc., 272 Conn. 469, 863 A.2d 645 (Conn. 2005) 13

Conoco, Inc. v. Republic Ins. Co., 819 F.2d 120 (5th Cir. 1987) 14

Danforth v. Minnesota, 552 U.S. 264 (2008) 7

Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677 (2006) 3

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167 (2000) 13

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 8

Garcia v. Truck Insurance Exchange, 36 Cal.3d 426 (1984) 9

Gart v. Cole, 263 F.2d 244 (2d Cir. 1959) 10

Glock v. Howard & Wilson Colony Co., 123 Cal. 1 (1898) 12

Guy v. Leiderbach, 501 Pa. 47, 459 A.2d 744 (Pa. 1983) 11

Hallstrom v. Tillamook County,
493 U.S. 20 (1989) 13
Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981) 10
In re Marriage of Bouquet,
16 Cal.3d 583 (1976) 12
Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin., 603 F.3d 365 (7th Cir. 2010) 2
Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 7
Joseph v. Hospital Service Dist. No. 2, 939 So.2d 1206 (La. 2006) 11
Kane Enter. v. MacGregor (USA) Inc.,
322 F.3d 371 (5th Cir. 2003) 13
Karo v. San Diego Symphony Orchestra Ass'n,
762 F.2d 819 (9th Cir. 1985) 9, 11, 12
Knudson v. City of Ellensburg,
832 F.2d 1142 (9th Cir. 1987) 12
Kowalski v. Tesmer, 543 U.S. 125 (2004) 9
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 7
Martinez v. Socoma Companies, Inc.,
11 Cal.3d 394 (1974) 11
Miree v. DeKalb County,
433 U.S. 25 (1977) 4, 11, 14
More v. Churchill, 155 Cal. 368 (1909) 10
Northwest Airlines, Inc. v. County of Kent,
510 U.S. 355 (1994) 8
OEC-Diasonics, Inc. v. Major,
674 N.E.2d 1312 (Ind. 1996) 13
Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 14

Outdoor Services, Inc. v. Pabagold, Inc.,
185 Cal.App.3d 676 (Cal. App. 1986) 11
Palma v. Verex Assur., Inc.,
79 F.3d 1453 (5th Cir. 1996) 14
Peabody v. Weider Publications, Inc., 260
Fed.Appx. 380 (2d Cir. 2008) 12
Renne v. Geary, 501 U.S. 312 (1991) 9
Shaw Constructors v. ICF Kaiser Eng'rs, Inc.,
395 F.3d 533 (5th Cir. 2004) 13
Skookum Oil Co. v. Thomas,
162 Cal. 539 (1912) 12
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 8
Taylor v. Sturgell, 553 U.S. 880 (2008) 7
Texas Industries, Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 5
U.S. v. Andreas, 216 F.3d 645 (7th Cir. 2000) 10
U.S. v. Kimbell Foods, Inc.,
440 U.S. 715 (1979) 3-5, 7
U.S. v. Standard Oil Co., 332 U.S. 301 (1947) 5
United Steelworkers of Am. v. Rawson,
495 U.S. 362 (1990) 10
Warth v. Seldin, 422 U.S. 490 (1975) 8
Wilder v. Virginia Hosp. Ass'n,
496 U.S. 498 (1990) 2
Wyoming v. Oklahoma, 502 U.S. 437 (1992) 9
Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 13

Statutes

U.S. CONST. art. I, §8, cl. 1 ..... 2, 6

Medicaid Act,
42 U.S.C. 1396 *et seq*..... 2, 3, 5-7, 9, 11, 12, 14
42 U.S.C. §1316(a)(3) 3
42 U.S.C. §1396a(a)..... 3

Rules, Regulations and Orders

S. CT. RULE 37.6..... 1
FED. R. CIV. P. 12(b)(1) 6, 13
FED. R. CIV. P. 12(b)(6) 13
42 C.F.R. §430.10 3
42 C.F.R. §430.18 3
42 C.F.R. §430.60 3
42 C.F.R. §430.76 3
42 C.F.R. §430.102(c) 3

Other Authorities

RESTATEMENT (SECOND) OF CONTRACTS 11
RESTATEMENT (SECOND) OF CONTRACTS §304
comment b 11

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae APA Watch is a nonprofit membership corporation headquartered in McLean, Virginia. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on third-party enforcement and justiciability issues. *See, e.g., Stormans Inc. v. Seleky*, No. 07-36039 (9th Cir.) (third-party justiciability); *Envtl. Defense v. Duke Energy Corp.*, No. 05-848 (U.S.) (third-party enforcement), *Astra USA, Inc. v. Santa Clara County, Cal.*, No. 09-1273 (U.S.) (third-party federal common-law cause of action). Although the third-party enforcement here does not directly affect APA Watch members, the premature second-guessing of agency enforcement and disrupting the contracting parties' expectations present an issue of fairness on which APA Watch seeks to comment. Moreover, because the litigants have not fully briefed the plaintiffs' standing, APA Watch's perspective on third-party justiciability could aid the Court on a jurisdictional issue antecedent to the parties' merits

---

[1] This *amicus* brief is filed with written consent of all parties; the written letters of consent from petitioner and respondents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief and no counsel for a party authored this brief in whole or in part, nor did any person or entity other than the *amicus* and its counsel make a monetary contribution to the preparation or submission of this brief.

arguments. For these reasons, APA Watch respectfully files this *amicus* brief.

FACTUAL AND LEGAL BACKGROUND

In these three consolidated cases, a variety of plaintiffs (respondents here and, collectively, "Providers") sought and obtained a preliminary injunction against California's implementation and planned implementation of the Medicaid statute, 42 U.S.C. 1396 *et seq.* *Amicus* APA Watch adopts the facts as set forth in petitioner California's brief, and sets out the following legal background relevant to APA Watch's argument that the Providers lack standing.

Enforcement of Spending-Clause Legislation

Courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the affected public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.,* 603 F.3d 365, 386 (7th Cir. 2010); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. With the required notice, recipients may face enforcement for violations. *Id.* at 187-89. Without the required notice, they do not.

Medicaid Statute

Established in 1965, Medicaid is a cooperative federal-state program that provides medical care to needy individuals. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 502 (1990). State participation in Medicaid is voluntary under the Spending Clause,

but participating States agree to comply with requirements imposed by the Medicaid statute and the implementing regulations of the Department of Health & Human Services ("HHS").

To qualify for federal funds, participating States must submit to HHS and receive approval of "a plan for medical assistance" on the nature and scope of that State's Medicaid program. 42 U.S.C. §1396a(a); 42 C.F.R. §430.10. In addition, after the initial approval, States may submit a "State plan amendment" or "SPA" to revise the State plan. 42 C.F.R. §430.12, as California has done here. If HHS denies the SPA (as HHS has done here), the State may request reconsideration of that disapproval (as California has done here), which initiates an administrative process including a formal hearing – including the opportunity for public participation – and the eventual opportunity for judicial review directly in the Court of Appeals for the appropriate Circuit. 42 C.F.R. 430.18, 430.60, 430.76, 430.102(c); 42 U.S.C. 1316(a)(3). These required processes have not run their course.

Federal Common Law

"This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Thus, "[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract." *Boyle v. United Tech. Corp.*, 487 U.S. 500, 519 (1988); *cf. Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006) ("Court has made clear that uniform federal law need not be applied to all questions in federal government litigation, even in

cases involving government contracts") (internal quotations omitted). For *private enforcement* of a federal contract or program, however, a uniform federal rule of decision is not required if the claim "will have *no direct effect upon the United States or its Treasury.*" *Boyle*, 487 U.S. at 520 (*quoting Miree v. DeKalb County*, 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). While this Court typically applies federal common law to litigation involving the federal government, it does not necessarily do so for private enforcement of the same federal provisions.

"Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *Kimbell Foods*, 440 U.S. at 727-28. This Court could adopt a federal rule of decision that looks to state law: "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *Kimbell Foods*, 440 U.S. at 728. Indeed, "[t]he prudent course ... is often to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *McVeigh*, 547 U.S. at 691-92 (internal quotation omitted). In other words, notwithstanding that federal law applies, the federal rule of decision nonetheless could be "*See the state rule.*"

Finally, "federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." *Kimbell Foods*, 440 U.S. at 728 (*citing United States v. Yazell*, 382 U.S. 341, 354 (1966)) (interior quotations omitted). "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such

narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). Generally, therefore, this Court has discretion "[w]hether to adopt state law or to fashion a nationwide federal rule," *Kimbell Foods*, 440 U.S. at 728, based on "a variety of considerations ... relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *U.S. v. Standard Oil Co.*, 332 U.S. 301, 310 (1947). In sum, this Court makes a case-by-case determination on the need for uniform federal rules, based on the totality of the circumstances.

In light of the highly technical nature of both the Medicaid statute and its implementing regulations and of the potentially national – albeit piecemeal – scope of this litigation through similarly situated entities in other States, *amicus* APA Watch respectfully submits that this Court should adopt uniform federal rules of decision. As it happens, however, the rules would be the same under California or federal law.

SUMMARY OF ARGUMENT

As signaled by the preceding subsection, *amicus* APA Watch submits that this case calls upon this Court to adopt a rule of decision under the federal common law. While the parties focus on the availability of a third-party cause of action to enforce a provision of Medicaid's reimbursement regime, *amicus* APA Watch respectfully submits that this Court first must adopt a federal rule of decision for third-party beneficiaries' standing to enforce the

contractual aspects of a recipient's obligations to the United States under the Spending Clause. Because it is antecedent to the merits question presented here, the standing inquiry assumes *arguendo* the plaintiffs' merits views (*i.e.*, that the Providers may maintain suit under the Supremacy Clause to enforce their particular provision of the Medicaid puzzle) and then asks whether those plaintiffs meet the constitutional and prudential tests for standing. Because it is integral to federal jurisdiction, the standing inquiry comes first. If the Providers lack standing, the case must be dismissed for lack of jurisdiction under FED. R. CIV. P. 12(b)(1).

Section I argues that this Court – like all federal courts – has an independent duty to consider standing, whether or not the parties have raised it. Concurring with California (Opening Br. at 49-53), Section II argues that the Providers do not have third-party standing to enforce the rights of HHS or the United States, both because they lack the required close relationship and because nothing hinders the federal government's enforcing its own rights. Finally, and notwithstanding that this Court must assume the Providers' non-frivolous merits views to evaluate jurisdiction, Section III argues that the Providers lack standing for the relief that they seek because *even the United States* could not obtain the relief that the Providers seek at this juncture, before the required administrative process unfolds. What the promisee lacks a vested right to enforce directly, a third-party beneficiary lacks a cognizable right to enforce indirectly, regardless of whether that third party could enforce the contract after the right vests for the promisee.

ARGUMENT

Although this Court's "normal role is to interpret law created by others and not to prescribe what [the law] shall be," *Danforth v. Minnesota*, 552 U.S. 264, 290 (2008) (internal quotation omitted), "this Court has ultimate authority to determine and declare" the federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Here, federal law obviously applies – under Article III for jurisdiction and under Medicaid's express terms for the merits – but "[t]he more difficult task ... is giving content to this federal rule." *Kimbell Foods*, 440 U.S. at 727. Although it presents no position on the merits, *amicus* APA Watch respectfully submits that this litigation must be dismissed: the Providers have no cognizable right, much less a right of action, under Medicaid.

I. CALIFORNIA CANNOT WAIVE THE PROVIDERS' LACK OF STANDING

Article III limits federal courts to "cases" and "controversies," U.S. CONST. art. III, §2, which requires an actual or imminent "injury in fact" to a cognizable interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, constitutional standing presents a tripartite test: "an invasion of a *legally protected interest*" of the plaintiff, caused by the defendants, and redressable by a court. *Defenders of Wildlife*, 504 U.S. at 560-62 (emphasis added).

Moreover, even if California had not contested standing, litigants cannot confer federal jurisdiction by consent or waiver: "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982);

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). To the contrary, because it goes to the Article III "power of the court to entertain the suit," standing "is *the threshold question* in every federal case." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis added). "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (*quoting Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Consequently, the Provider's standing is antecedent to the cause-of-action question on which the parties join. *Steel Co.*, 523 U.S. at 89-90:

> *It is firmly established in our cases that the absence of a valid ... cause of action does not implicate subject-matter jurisdiction*, i.e., *the courts' statutory or constitutional* power *to adjudicate the case.*

Id. at 89 (emphasis in original); *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("[t]he question whether a federal statute creates a claim for relief is not jurisdictional"). Under its precedents – and its constitutional jurisdiction – this Court must evaluate standing before the cause-of-action issue in the Question Presented. If the Providers lack standing, that ends the inquiry, without answering the question.

II. PROVIDERS CANNOT LITIGATE THE INJURIES OF HHS

It is, of course, "axiomatic" that a "litigant first must clearly demonstrate that [it] has suffered

an injury in fact in order to assert Article III standing to sue." *Wyoming v. Oklahoma*, 502 U.S. 437, 465 (1992) (interior quotations omitted). Because plaintiffs bear the burden of establishing their standing, federal courts "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). As explained in the next section, the Providers lack standing under Medicaid.

Significantly, the Providers lack standing to litigate the United States' injuries. A plaintiff can assert the rights of absent third parties only if the plaintiff itself has constitutional standing, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the absent third party from protecting its own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Even assuming *arguendo* that the Providers could establish constitutional standing on their own, they would fail the second and third prongs of the test for litigating the United States' injuries: (a) they lack the requisite close relationship with the federal government, and (b) nothing hinders HHS from eventually proceeding against California if the Providers are correct on the merits.

III. THIRD-PARTY BENEFICIARIES LACK STANDING TO ENFORCE RIGHTS THAT HAVE NOT VESTED IN THE PROMISEE

At the outset, only *intended* beneficiaries have standing to enforce an agreement. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821-22 (9th Cir. 1985); *Garcia v. Truck Insurance Exchange*, 36 Cal.3d 426, 436-37 (1984). Those who are not intended beneficiaries are mere interlopers who lack

standing to sue to enforce other parties' contract. *U.S. v. Andreas*, 216 F.3d 645, 664 (7th Cir. 2000) (those "not parties or third-party beneficiaries ... do not have standing to enforce the terms of [an] agreement); *More v. Churchill*, 155 Cal. 368, 369-70 (1909); *cf. Gart v. Cole*, 263 F.2d 244, 250-51 (2d Cir. 1959) (individual landowners and tenants lack standing to enforce sponsorship agreements under the Housing Act, which are designed to benefit the public at large). Significantly, even intended beneficiaries need not have the intended right to enforce the bargain, particularly for government promisees like HHS:

> *The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.*

Astra USA, Inc. v. Santa Clara County, Cal., __ U.S. __, 2011 WL 1119021, 5 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Federal agencies, of course, are bound by their own statutes and regulations, which can pose conditions precedent to enforcement in court. Foregoing that process, the Providers here propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra*, __ U.S. __, 2011 WL 1119021, at 5. California – and the other States – never agreed to that, and federal law does not sanction it.

Significantly, even *intended* third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 375 (1990); *Holbrook v. Pitt*, 643 F.2d 1261, 1273 n.24

(7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"); *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 697 (2d Cir. 1993) ("third-party beneficiary ... possessed no greater right to enforce a contract than the actual parties to the contract"), which links the third-party beneficiaries' rights to the same conditions as the promisee's rights. RESTATEMENT (SECOND) OF CONTRACTS §304 comment b. To the extent that the Providers depend on California's Medicaid obligations to HHS, the Providers' rights are subject to the same conditions precedent as HHS's rights. *What HHS could not do directly as the promisee, the Providers cannot do indirectly as a third-party beneficiary.*

Under *Miree v. DeKalb County*, 433 U.S. 25, 28 (1977), federal courts can look to state law for third-party beneficiaries' standing to enforce federal obligations. California follows the RESTATEMENT (SECOND) OF CONTRACTS, *Martinez v. Socoma Companies, Inc.*, 11 Cal.3d 394, 401-02, 404-05 (1974) (citing RESTATEMENT OF CONTRACTS and then-tentative drafts of the RESTATEMENT (SECOND) OF CONTRACTS); *Outdoor Services, Inc. v. Pabagold, Inc.*, 185 Cal.App.3d 676, 683-84 (Cal. App. 1986) (citing RESTATEMENT (SECOND) OF CONTRACTS), as do most other states. *See, e.g., Guy v. Leiderbach*, 501 Pa. 47, 459 A.2d 744, 750-52 (Pa. 1983); *Joseph v. Hospital Service Dist. No. 2*, 939 So.2d 1206, 1213 (La. 2006).

An intended beneficiary must assert a vested right, *Karo*, 762 F.2d at 822 ("he must be seeking to

enforce a right that is personal to him and vested in him at the time of the suit"), without which "[h]e does not have standing to sue as a third party beneficiary because he had no vested rights." *Karo*, at 824; *Peabody v. Weider Publications, Inc.*, 260 Fed.Appx. 380, 383 (2d Cir. 2008) ("[b]ecause the condition precedent never came to fruition, Peabody's rights ... never vested") (non-precedential summary order). A "vested right" is one "not subject to a condition precedent." *In re Marriage of Bouquet*, 16 Cal.3d 583, 591 n.7 (1976); *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 545 (1912) ("[n]either will equity relieve such [party] who ... has not fulfilled conditions precedent to the vesting of his right of action"); *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1147 (9th Cir. 1987). Given that HHS could not have brought this action *under Medicaid* without completing the administrative prerequisites, neither HHS nor California intended third-party beneficiaries to enforce Medicaid – or, really, to *short-circuit* Medicaid – without satisfying those prerequisites.[2] Under the circumstances, the Providers lack standing to sue.

---

[2] *See, e.g., Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 16-17 (1898) (when a "contract is made to depend upon a condition precedent" and "[b]y its terms no right is to vest ... until certain acts ... have been done by [a party]," "a court of equity no more than a court at law will relieve [the party], under such circumstances ... in the absence of an equitable showing to excuse his default"); *Chen v. Chen*, 586 Pa. 297, 311-13, 893 A.2d 87, 96 (Pa. 2006); *OEC-*

(Footnote cont'd on next page)

Unmet conditions precedent can affect both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). For example, Louisiana law for stipulations *pour autrui* (*i.e.*, third-party beneficiary contracts) suggests that failure to meet the promisee's conditions precedent renders third-party beneficiaries unable to state a claim. *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane Enter. v. MacGregor (USA) Inc.*, 322 F.3d 371, 375 (5th Cir. 2003). Even if unmet conditions precedent implicated only Rule 12(b)(6) *for promisees*,[3] they nonetheless would

---

(Footnote cont'd from previous page.)

Diasonics, Inc. v. Major, 674 N.E.2d 1312, 1314-15 (Ind. 1996); *Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 476-78, 863 A.2d 645, 649-50 (Conn. 2005).

[3] Numerous statutory regimes set conditions precedent to private enforcement to notify the putative defendant of alleged violations and to provide an opportunity to resolve them. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982); *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 174-75 (2000); *Hallstrom v. Tillamook County*, 493 U.S. 20, 32-33 (1989). Regardless of "whether the notice provision is jurisdictional or procedural," private enforcement is "barred" and "must be dismissed" if it commenced prior to the required notice. *Hallstrom*, 493 U.S. at 32-33. Even if not jurisdictional under constitutional standing, that is fatal under statutory standing,

(Footnote cont'd on next page)

implicate jurisdiction for third-party beneficiaries, who lack standing to enforce non-vested rights. *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 123-24 (5th Cir. 1987); *Palma v. Verex Assur., Inc.*, 79 F.3d 1453, 1458 (5th Cir. 1996). Without the conditions precedent to Medicaid enforcement, the Providers have no legally protected interest in Medicaid reimbursement and thus no standing here.

Whether this Court adopts a federal rule of decision or relies on California law under *Miree*, third-party beneficiaries plainly lack standing to enforce contractual provisions that even the promisee could not enforce without having met the conditions precedent to contractual enforcement.

CONCLUSION

For the foregoing reasons, this Court should hold that the Providers lack standing to bring their third-party claim to enforce Medicaid.

(Footnote cont'd from previous page.)

which this Court also can address at this stage. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999).

May 26, 2011

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave, NW
Suite 200
Washington, DC 20036
Tel (202) 669-5135
Fax (202) 318-2254
Email ljoseph@larryjoseph.com

RECORD
AND
BRIEFS

Nos. 09-958, -1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *Respondent*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, ET AL., *Petitioners*,
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL., *Respondents*.

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, *Petitioner*,
v.
SANTA ROSA MEMORIAL HOSPITAL, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN UNTEREINER
Counsel of Record
MARK T. STANCIL
ALEX POTAPOV
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THIS COURT SHOULD UNAMBIGUOUSLY HOLD THAT A CAUSE OF ACTION EXISTS UNDER THE SUPREMACY CLAUSE FOR INJUNCTIVE RELIEF AGAINST PRE-EMPTED STATE LAWS 9

A. This Court's Decisions And Longstanding Practice Already Establish This Cause Of Action 9

B. The Court Should Reject Petitioners' Efforts To Sow Doubt About, And To Limit, This Important Cause Of Action Based On Inapposite Case Law Involving Either Section 1983 Or Implied Rights Of Action Under Federal Statutes 13

TABLE OF CONTENTS—Continued

Page

II. THIS COURT'S ESTABLISHED APPROACH FINDS SUPPORT IN THE HISTORY OF THE SUPREMACY CLAUSE AND IS NECESSARY TO EFFECTUATE ITS PURPOSE AND TO BRING ABOUT THE SIGNIFICANT BENEFITS OF THE PREEMPTION DOCTRINE 17

A. The Framers Assigned The Principal Responsibility To Enforce Federal Supremacy To The Courts Rather Than To Congress 17

B. Petitioners' Rule Would Harm Businesses And Consumers And Undermine The Significant Benefits Flowing From The Preemption Doctrine 24

III. PETITIONERS' ATTEMPTS TO NARROW THE CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE TO EXCLUDE THIS CASE IMPROPERLY IMPORT CONCERNS THAT ARE NOT GROUNDED IN THE SURPREMACY CLAUSE, AND ARE APPROPRIATELY ADDRESSED BY STANDING RULES AND THE SUBSTANTIVE LAW OF PREEMPTION 30

A. The Supremacy Clause Does Not Support Petitioners' Proposed Limitation, And Standing Rules Ensure That Preemption Lawsuits Are Brought, As Here, Only By Appropriate Plaintiffs 30

TABLE OF CONTENTS—Continued

Page

B. Whether Spending Clause Legislation Should Be Treated Differently Is A Question Of Preemption Doctrine 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

American Nat'l Red Cross v. *S.G.*,
505 U.S. 247 (1992) 16

Arkansas Dep't. of Health & Human Services v. *Ahlborn*,
547 U.S. 268 (2006) 11

Arkansas Electric Coop. Corp. v. *Arkansas Public Service Comm'n*,
461 U.S. 375 (1983) 28

Bethlehem Steel Co. v. *New York State Labor Relations Board*,
330 U.S. 767 (1947) 28

Blum v. *Bacon*,
457 U.S. 132 (1982) 34

Carleson v. *Remillard*,
406 U.S. 598 (1972) 34, 35

Chamber of Commerce of the United States v. *Brown*,
554 U.S. 60 (2008) 2

Chamber of Commerce of the United States v. *Whiting*,
131 S. Ct. 1968 (2011) 2

City of Los Angeles v. *Lyons*,
461 U.S. 95 (1983) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Cort v. *Ash*,
422 U.S. 66 (1975) 14, 16, 24

Crosby v. *National Foreign Trade Council*,
530 U.S. 363 (2000) 2, 14

Davis v. *Passman*,
442 U.S. 228 (1979) 24

Ex parte Young,
209 U.S. 123 (1908) 10

Farricielli v. *Holbrook*,
215 F.3d 241 (2d Cir. 2000) 12

Foster v. *Love*,
522 U.S. 67 (1997) 14

Gade v. *Nat'l Solid Wastes Mgmt. Ass'n*,
505 U.S. 88 (1992) 2, 14

Geier v. *American Honda Motor Co.*,
529 U.S. 861 (2000) 7

Golden State Transit Corp. v. *City of Los Angeles*,
493 U.S. 103 (1989) 13, 32

Gonzaga Univ. v. *Doe*,
536 U.S. 273 (2002) 14, 16, 24

Green v. *Mansour*,
474 U.S. 64 (1985) 5, 12, 13, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Guar. Nat'l Ins. Co. v. *Gates*,
916 F.2d 508 (9th Cir. 1990) 12

Hughes v. *Oklahoma*,
441 U.S. 322 (1979) 17

Indep. Living Ctr. of S. California, Inc. v. *Shewry*,
543 F.3d 1050 (9th Cir. 2008) 12, 31

Lorillard Tobacco Co. v. *Reilly*,
533 U.S. 525 (2001) 14

Morales v. *Trans World Airlines*,
504 U.S. 374 (1992) 29

NLRB v. *Nash-Finch Co.*,
404 U.S. 138 (1971) 28

Osborn v. *Bank of the United States*,
22 U.S. (9 Wheat.) 738 (1824) 11

Pharm. Research & Mfrs. of Am. v. *Concannon*,
249 F.3d 66 (1st Cir. 2001) 12

Pharm. Research & Mfrs. of Am. v. *Walsh*,
538 U.S. 644 (2003) 2, 12, 36

Planned Parenthood of Houston and Southeast Tex. v. *Sanchez*,
403 F.3d 324 (5th Cir. 2005) 12

Ray v. *Atlantic Richfield Co.*,
435 U.S. 151 (1978) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Rowe v. *New Hampshire Motor Transp. Ass'n*,
552 U.S. 364 (2008) ..... *passim*

Shaw v. *Delta Airlines, Inc.*,
463 U.S. 85 (1983) 9, 10

St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. *Gov't of U.S. Virgin Islands*,
218 F.3d 232 (3d Cir. 2000) 12

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 31

Transamerica Mortg. Advisors, Inc. v. *Lewis*,
444 U.S. 11 (1979) 15

Verizon Maryland Inc. v. *Pub. Serv. Comm'n of Maryland*,
535 U.S. 635 (2002) 10

Watters v. *Wachovia Bank, N.A.*,
550 U.S. 1 (2007) 2, 11

Wilder v. *Virginia Hosp. Ass'n*,
496 U.S. 498 (1990) 3

Constitutional Provision and Statutes

U.S. CONST., art. VI, cl. 2 ..... 3, 9, 18, 22

15 U.S.C. § 2075(c)(2) 27

21 U.S.C. § 343-1 25

28 U.S.C. § 1331 10

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 1396a(a)(30)(A) 4, 7

42 U.S.C. § 1983 ..... 13, 23

49 U.S.C. § 5125(e)(2) 27

49 U.S.C. § 20106(a)(1) 25

49 U.S.C. § 20106(a)(2)(C) 27

49 U.S.C. §§ 20301-20306 27

49 U.S.C. §§ 20701-20703 27

49 U.S.C. § 41713(b) 29

Other Authorities

Samuel Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345 (2008) 34

Michele Bradley, *The States' Role in Regulating Food Labeling and Advertising: The Effect of the Nutrition Labeling and Education Act of 1990*, 49 FOOD & DRUG L.J. 649 (1994) 26, 27

Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) 19

Bradford Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003) 19, 20, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) 20

R. FALLON, JR., J. MANNING, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009) 11, 12, 13

James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 PAPERS OF JAMES MADISON 345 (R. Rutland & W. Rachal eds. 1975) 18

James Madison, *Notes on the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed. 1911) 19, 20, 21

Michael McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in NEW DIRECTIONS IN LIABILITY LAW 90 (Walter Olson ed., 1988) 26, 27

Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) 26

Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) 18, 22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355 (2004) 15, 16

The Federalist No. 15 21

13D C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE (3d ed. 2008) 10, 12

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Chamber's members depend on the robust enforcement of conflict preemption principles as protection against state and local mandates that interfere or conflict with requirements imposed by federal law. The Supremacy Clause of the Constitution, which is the fountainhead of the doctrine of conflict preemption,

---

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under this Court's Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

serves a vital structural role in our Nation's government and economy by (a) protecting all federal laws and programs against interference by subordinate governments; and (b) eliminating regulatory burdens placed on the formation and operation of unified national markets for goods and services. Those crucial societal benefits depend on the availability of effective means for injured businesses and other litigants to enforce the Supremacy Clause in the courts—the primary institutions to which the Framers assigned this important responsibility. In this case, petitioners seek to weaken or eliminate a significant, time-tested method for such enforcement: the cause of action for equitable relief under the Supremacy Clause.

The Chamber has relied on this cause of action in seeking to vindicate the interests of its members. See, *e.g.*, *Chamber of Commerce of the United States* v. *Whiting*, 131 S. Ct. 1968 (2011); *Chamber of Commerce of the United States* v. *Brown*, 554 U.S. 60 (2008). When not acting as a party, the Chamber has frequently supported such suits as an *amicus curiae*. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court correctly resolves the important issue presented here.

STATEMENT

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. The question presented by this case is whether the Supremacy Clause furnishes a cause of action for injunctive relief against state enactments that are preempted by federal law.

The federal statute involved here is the Federal Medicaid Act, which sets out "a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). States that choose to accept federal funding must comply with certain requirements set out in the statute, as well as in regulations promulgated by the Secretary of Health and Human Services. California has accepted funding and is therefore bound by those requirements in administering the State's Medicaid program (known as "Medi-Cal").

In a series of lawsuits, various entities and individuals—including hospitals, pharmacies, pharmacists, adult day health centers, and individual Medicaid recipients—challenged several California statutes, each of which reduced Medicaid payment rates. The plaintiffs (respondents here) argued that, by ordering further successive reductions in California payment rates that *were already the lowest*

in the Nation on an average per-enrollee basis, the California statutes violated Section 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Section 30(A) provides, in relevant part, that States must take certain steps to "assure that payments" are not only "consistent with efficiency, economy, and quality of care" but also "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." In each of the cases, the district court ultimately entered a preliminary injunction against the challenged rate reduction, and the Ninth Circuit affirmed.

The two basic questions facing the Ninth Circuit were (1) whether the Supremacy Clause provided a cause of action for the respondents—Medicaid providers and recipients who face injury from the rate reductions—to seek injunctive relief on preemption grounds; and (2) whether the challenged California statutes imposing the rate reductions were in conflict with, and thus preempted by, the Medicaid Act. The Ninth Circuit answered both questions in the affirmative. This Court granted certiorari with respect to only the first question. As this case comes to the Court, then, it is undisputed that the challenged California statutes violate or directly conflict with Section 30(A) of the Medicaid Act.

SUMMARY OF ARGUMENT

The question presented is whether this Court should foreclose (or at least sharply curtail) an avenue of relief that has long been available: namely, a cause of action for equitable relief against preempted state laws. The Court should adhere to its

historical practice and continue to recognize the preemption cause of action. Furthermore, it should hold explicitly that this cause of action arises under the Supremacy Clause.

I. This conclusion is dictated by this Court's longstanding and consistent practice over almost 200 years. The Court has specifically held that there is federal jurisdiction over preemption claims. Moreover, the Court has routinely proceeded directly to the merits of such claims, frequently granting relief to plaintiffs requesting injunctive relief against preempted state or local laws without doubting that there was a valid cause of action. These decisions firmly establish the general availability of a private cause of action for prospective relief on preemption grounds.

Multiple lower courts and commentators have correctly recognized that this cause of action is rooted in the Supremacy Clause. This Court has also recognized the nexus, explaining that "the availability of prospective relief . . . gives life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

Petitioners mistakenly seek to impair that vitality by confining this cause of action to the parameters of the Court's Section 1983 and implied-cause-of-action jurisprudence. They cannot account, however, for the Court's different approach to preemption cases. Instead of applying the analytical frameworks it has developed in the Section 1983 and implied-cause-of-action contexts, the Court in preemption cases proceeds directly to the merits. This longstanding and consistent approach is justified, as the preemption

cause of action is different from these points of comparison in several crucial respects.

II. The history of the Supremacy Clause demonstrates that the Framers entrusted enforcement of federal supremacy to the courts, and that they regarded the Supremacy Clause as the effective means of accomplishing that objective. The Supremacy Clause was adopted to prevent States from flouting federal law. It was chosen over two alternatives—one that would have placed the responsibility for ensuring federal supremacy on the Executive Branch (by authorizing the Union to coerce noncompliant States with military force), and another that would have relied on affirmative action by Congress (by giving it a "negative" over state law). The Supremacy Clause was ultimately chosen because it was viewed as an adequate substitute for the Congressional negative; in other words, it was a potent, affirmative guarantee of federal supremacy, to be implemented by the courts. In recognizing the preemption cause of action, this Court is ensuring that the judiciary will continue to perform the role assigned to it by the Supremacy Clause.

Furthermore, this cause of action remains vitally important as a safeguard against widespread flouting of federal law by state and local governments. If credited, the petitioners' position would undermine the effectiveness of federal preemption. That, in turn, would harm businesses and consumers by undercutting the crucial systemic benefits of preemption, which include the promotion of regulatory uniformity, the flourishing of a unified national marketplace, and the enablement of national deregulatory policies.

III. Petitioners say that a cause of action should not be available in this case because the challenged California statutes do not directly regulate the respondents' conduct. Such a requirement would add little, however, because standing rules already ensure that only appropriate plaintiffs may bring preemption actions. Moreover, this limitation makes no sense because it would require courts to treat direct and indirect regulations differently even if they have the identical effect on the plaintiffs and are equally preempted. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (rejecting analysis that would "further complicat[e] well-established pre-emption principles that already are difficult to apply").

Finally, the petitioners argue that the Supremacy Clause cause of action should be unavailable with respect to Spending Clause statutes, because such statutes resemble contracts more than ordinary legislation. That is squarely at odds with the Court's cases, which treat Spending Clause statutes as having fully preemptive force. Moreover, that contention is simply a preemption argument on the merits, rather than an argument concerning the existence of a cause of action. As such, it is irrelevant in this case.

ARGUMENT

The central issue in this case is whether this Court should decline to recognize an equitable right of action under the Supremacy Clause to enjoin California officials from implementing and enforcing state laws that violate or directly conflict with a provision of the Federal Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Petitioners and their *amici*

correctly acknowledge that this Court's cases recognize a federal equitable cause of action to enjoin state laws preempted under the Supremacy Clause, at least in certain circumstances. See Brief of National Governors Ass'n et al., at 23-24 (recognizing "a right in equity to assert an anticipatory defense against the enforcement of a pre-empted State law") ("NGA Br."); Pet. Br. 43-44 & n.15 (same; recognizing as well that "the federal government may sue to enjoin state law that purportedly is preempted by federal law"); U.S. Br. 21 & n.7. For its part, the United States further acknowledges that this cause of action has "considerable historical grounding," is "well established," and "serves an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 n.7.

Despite these concessions, petitioners and their *amici* repeatedly seek to cast doubt upon a line of this Court's cases that, as respondents demonstrate, extends back almost 200 years. See Brief of Respondents Santa Rosa Memorial Hospital et al., at 18-26 ("Santa Rosa Resp. Br."); Brief of Intervenor Respondents in No. 09-958 and *California Pharmacists* Respondents in No. 09-1158, at 20-31 ("*California Pharmacists* and Intervenor Resp. Br."); Brief for *Dominguez* Respondents in Case No. 09-1158, at 7-11 & App. 1a-11a (listing 61 decisions of this Court) ("*Dominguez* Resp. Br."). Petitioners' principal contention is that this cause of action should not be available when the preemption arises from a statute enacted under the federal Spending Clause.

This Court should reject that departure from longstanding practice. Proper resolution of this

question turns on the nature of the Supremacy Clause, not the particular statute at issue. The Supremacy Clause was intended as an affirmative guarantee that national law will be effective in displacing inconsistent state and local regulation. And it is undisputed that responsibility for enforcing that guarantee was vested in the judiciary; indeed, petitioners and their *amici* acknowledge that the Framers rejected alternative proposals that would have required Congress to serve as the arbiter of federal supremacy. Pet. Br. 38; NGA Br. 4, 14-16. And yet that is precisely what petitioners and their *amici* now urge in claiming that there is no cause of action under the Supremacy Clause (in this statutory context, at least)—if Congress does not affirmatively supply a *statutory* right of action, they say, then the *constitutional* guarantee of federal supremacy is merely hypothetical. But the Supremacy Clause flatly declares that federal law "*shall* be the supreme Law of the Land," U.S. CONST., art. VI, cl. 2 (emphasis added), not that it "ought" to be supreme if Congress so provides.

I. THIS COURT SHOULD UNAMBIGUOUSLY HOLD THAT A CAUSE OF ACTION EXISTS UNDER THE SUPREMACY CLAUSE FOR INJUNCTIVE RELIEF AGAINST PRE-EMPTED STATE LAWS

A. This Court's Decisions And Longstanding Practice Already Establish This Cause Of Action

Almost thirty years ago, in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court addressed the question of federal jurisdiction over preemption claims. The Court explained that "[a] plaintiff who

seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. at 96 n.14. That conclusion, which was emphatically reiterated in *Verizon Maryland Inc.* v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002), is rooted in a long line of authority stretching back at least to the seminal opinion in *Ex parte Young*, 209 U.S. 123 (1908). As a leading treatise observes: "The entire line of cases beginning with *Ex parte Young* establishes that in many circumstances a person confronted with efforts to apply state law may invoke federal question jurisdiction to restrain state officials on the ground of unconstitutionality of a state enactment. The version of unconstitutionality that arises from the preemptive effect the Supremacy Clause gives to federal statutes would seem to be no different." 13D C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 3566, at 288 (3d ed. 2008) (footnotes omitted) ("WRIGHT & A. MILLER"); see also *Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*).

To be sure, the issue of subject matter jurisdiction may be distinguished from the cause-of-action inquiry. *Verizon*, 535 U.S. at 642-43. But it is noteworthy that in *Shaw*, where a group of employers claimed that two New York statutes were preempted by federal law, the Court proceeded directly to the merits, without ever questioning whether there was a valid cause of action. *Shaw*, 463 U.S. at 95-96. Indeed, the Court granted relief to the employers, holding that one of the statutes was at least partially preempted. *Id.* at 108-09. In so doing, the Court

unmistakably indicated that the employers had a valid cause of action.

Moreover, as respondents persuasively demonstrate, *Shaw* is part of a long line of cases in which the Court has allowed private parties to seek prospective relief against state officials on pre-emption grounds. See Santa Rosa Resp. Br. 18-26; *California Pharmacists* and Intervenor Resp. Br. 20-31; *Dominguez* Resp. Br. 7-11 & App. 1a-11a (listing 61 decisions of this Court). Even the United States, in siding with petitioners, is constrained to admit that this Court has "decided *dozens* of preemption claims against state officials on their merits in cases brought in federal court." U.S. Br. 9 (emphasis added). As respondents persuasively demonstrate, this line of cases in fact stretches back almost 200 years, to the Court's decision in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See Santa Rosa Resp. Br. 18-19 (discussing *Osborn*); *California Pharmacists* and Intervenor Resp. Br. 20-21 (same); *Dominguez* Resp. Br. 7-8 (discussing *Osborn* and other early cases).[2]

In short, through its decisions and consistent practice over almost 200 years, this Court has made clear that there is a generally available cause of action for parties who seek to enjoin state action on the ground that it is preempted. See R. FALLON, JR.,

---

[2] Recent examples include *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Maine tobacco law), *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (Michigan banking regulations), and *Arkansas Dep't of Health & Human Services* v. *Ahlborn*, 547 U.S. 268 (2006) (Arkansas law governing liens asserted against tort settlements by Medicaid recipients). Earlier examples could be effortlessly multiplied. See *Dominguez* Resp. Br. App. 1a-11a (collecting cases).

J. MANNING, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 807 (6th ed. 2009) (describing as "well-established" the "rule" that a cause of action exists "to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within the federal question jurisdiction") ("HART AND WECHSLER"). Unsurprisingly, the lower courts have uniformly followed suit and recognized such a cause of action. See *Indep. Living Ctr. of S. California, Inc.* v. *Shewry*, 543 F.3d 1050, 1058-59 (9th Cir. 2008) (collecting cases).

Although this Court has not explicitly identified the precise source of this cause of action, many lower courts and commentators have correctly concluded that it arises under the Supremacy Clause. As the Wright & Miller treatise notes, this is "[t]he best explanation of *Ex parte Young* and its progeny." 13D WRIGHT & MILLER, *supra*, § 3566, at 292. At least five circuits have adopted this view. See *Planned Parenthood of Houston and Southeast Tex.* v. *Sanchez*, 403 F.3d 324, 334 & n.47 (5th Cir. 2005); *Pharm. Research & Mfrs. of Am.* v. *Concannon*, 249 F.3d 66, 73 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003); *St. Thomas-St. John Hotel & Tourism Ass'n, Inc.* v. *Gov't of U.S. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000); *Farricielli* v. *Holbrook*, 215 F.3d 241, 245 (2d Cir. 2000); *Guar. Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508, 511-512 (9th Cir. 1990).

That widespread understanding of the Court's case law and settled practice make perfect sense in light of the Court's observation, in *Green*, 474 U.S. at

68, that "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." In *Green*, the Court went on to explain that "[r]emedies designed to end a continuing violation of federal law are *necessary* to vindicate the federal interest in assuring the supremacy of that law." *Ibid.* (emphasis added). In other words, the Supremacy Clause loses meaning if prospective relief is unavailable to effectuate it. It therefore stands to reason that the cause of action for prospective relief is rooted in the Supremacy Clause itself.

B. The Court Should Reject Petitioners' Efforts To Sow Doubt About, And To Limit, This Important Cause Of Action Based On Inapposite Case Law Involving Either Section 1983 Or Implied Rights Of Action Under Federal Statutes

In an effort to call into question a cause of action that is "well-established" under this Court's cases (HART AND WECHSLER, *supra*, at 807), petitioners advance various arguments. All are meritless.

First, petitioners seize on a single sentence from *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989), where the Court stated that the Supremacy Clause "is not a source of any federal rights" (internal quotation marks omitted). Pet. Br. 35. But that quotation—viewed in context—merely clarifies that the Supremacy Clause does not create federal rights under 42 U.S.C. § 1983. See *Golden State Transit Corp.*, 493 U.S. at 107 (agreeing with the proposition that "the Supremacy Clause, of its own force, does not create rights *enforceable under § 1983*" (footnote omitted, emphasis added)). In any event, the quotation is beside the point. Even if the

Supremacy Clause does not create "rights," it does create a "federal interest in assuring the supremacy of [federal] law." *Green*, 474 U.S. at 68. That interest can be effectively vindicated only through the sort of prospective relief that the Court has consistently made available in cases like this.[3]

Equally unavailing is petitioners' argument that no cause of action should be recognized in this case because the Federal Medicaid Act itself neither contains an implied cause of action nor gives rise to a cause of action under Section 1983. Pet. Br. 22-26. Contrary to petitioners' submission, this Court's preemption decisions cannot be confined to the boundaries of the Court's Section 1983 and implied-cause-of-action jurisprudence.

This Court approaches preemption cases differently from cases involving enforceable "rights" under Section 1983 and implied rights of action under federal statutes. As noted above, instead of applying the frameworks it has developed for analyzing implied statutory causes of action and Section 1983 claims, see *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 282 (2002), the Court simply proceeds to the merits in preemption cases. See, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 540 (2001); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Foster* v. *Love*, 522 U.S. 67, 70-72 (1997); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992). Moreover, if the Court *had* applied those tests, in

---

[3] While the Supremacy Clause is the most plausible source of the preemption cause of action, other possibilities do exist. For instance, the United States suggests that it may be rooted "in the courts' historical exercise of equitable powers." U.S. Br. 20.

many preemption cases it would have found no cause of action. See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 391-98 (2004) (demonstrating that the federal statutes at issue in *Lorillard* and *Crosby* did not create express, implied, or Section 1983 causes of action). Nevertheless, the Court routinely decides such cases on the merits, making it clear that the *Cort* and *Gonzaga* tests are simply inapposite.

This approach is entirely justified. The preemption context is different in several crucial respects from the *Cort* and *Gonzaga* contexts, making different treatment not just rational but imperative. For starters, the *Cort* and *Gonzaga* lines of cases concern statutory causes of action (and, typically, efforts to secure retrospective relief in the form of compensatory or punitive damages). In that setting, the Court was understandably deferential to Congress in defining the precise contours of any available remedy. See *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979) (noting that "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction"). By contrast, the Supremacy Clause cause of action vindicates the Constitutional interest in the supremacy of federal law in the face of conflicting state action; therefore, it is entirely appropriate for the judiciary to take a more prominent role in fashioning it. See also Santa Rosa Resp. Br. 22-26 (discussing the Court's decisions recognizing claims arising directly under various other provisions of the Constitution without need of statutory authorization).

Moreover, Section 1983 is targeted at a different class of violations and provides a different set of remedies. Unlike the Supremacy Clause cause of action, which is limited to injunctive relief, Section 1983 allows for monetary damages. As a consequence, the former is necessarily targeted at ongoing or recurring violations, while the latter has no such limitation. The two mechanisms, therefore, have quite different functions: The Supremacy Clause cause of action operates to prevent systemic violations of federal law, while Section 1983 redresses individual injuries in appropriate circumstances. See Sloss, *supra*, at 413-15.

Finally, it should be noted that the Court's consistent concern with Congressional intent in the statutory right of action context, see *Cort*, 422 U.S. at 78, *Gonzaga*, 536 U.S. at 280, actually militates *in favor* of the Supremacy Clause cause of action. Because the Court has consistently allowed private parties to sue for injunctive relief against state officers without a finding that the statute contains a cause of action, Congress has had no reason to provide for such lawsuits explicitly. See *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992) (Congress is presumptively aware of settled backdrop of existing law). Far from effectuating congressional intent, petitioners' position would frustrate Congress's reliance on this well-established legal regime.

II. THIS COURT'S ESTABLISHED APPROACH FINDS SUPPORT IN THE HISTORY OF THE SUPREMACY CLAUSE AND IS NECESSARY TO EFFECTUATE ITS PURPOSE AND TO BRING ABOUT THE SIGNIFICANT BENEFITS OF THE PREEMPTION DOCTRINE

The Court's recognition of a cause of action for prospective relief under the Supremacy Clause is entirely consistent with the Clause's original meaning. A review of the history surrounding its adoption reveals two crucial principles: (1) the Framers entrusted the enforcement of federal supremacy to the courts; and (2) they regarded the Supremacy Clause as the means of effectively accomplishing that objective. A state of affairs where federal supremacy is flouted without recourse is repugnant to the Supremacy Clause. The cause of action for preemption actions is therefore essential.

A. The Framers Assigned The Principal Responsibility To Enforce Federal Supremacy To The Courts Rather Than To Congress

The Supremacy Clause was intended to address glaring shortcomings in the Articles of Confederation. See *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979) (the Framers believed that "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations . . . among the States under the Articles of Confederation"). One legal scholar has aptly summarized the shortcomings of the Articles of Confederation:

> In the absence of something like the Supremacy Clause, state courts might have sought to analo-

> gize federal statutes to the laws of a foreign sovereign, which they could ignore under principles of international law. . . . [Moreover,] [t]he Articles had not been ratified by conventions of the people in each state; states had manifested their assent merely by passing ordinary statutes authorizing their delegates to sign the Articles . . . . James Madison fretted that as a result, "whenever a law of a State happens to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority
>
> . . . .

Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 247-48, 251 (2000) (quoting James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 PAPERS OF JAMES MADISON 345, 352 (R. Rutland & W. Rachal eds. 1975)).

To address these structural deficiencies in the Articles, the Framers included the Supremacy Clause, which broadly provides that "the Laws of the United States . . . *shall* be the supreme Law of the Land . . . *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*" U.S. CONST., art. VI, cl. 2 (emphasis added). By its terms, the Supremacy Clause makes all federal laws automatically preemptive of state and local laws to the extent that the latter impose conflicting obligations or requirements. It declares that federal law "shall" be supreme, not that it "may" displace inconsistent state and local regimes—that is, it states an affirmative constitutional guarantee that federal law will control; it is not a statement that federal law has the mere potential to trump in case of conflict.

That affirmative guarantee reflects a deliberate choice by the Framers. During the Constitutional Convention, the Founders considered "three mechanisms for resolving conflicts between federal and state law." Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1348 (2001). Compare NGA Br. 14-19 (discussing only two of the three mechanisms). Significantly for present purposes, each of the three proposed mechanisms relied on different institutions of government to enforce the principle of federal supremacy, each with markedly different consequences for what the Clause would accomplish in practice.

First, the Virginia (or Large State) Plan proposed "authorizing the Union to use military force to coerce the states to comply with federal law." Bradford Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 325 (2003). This plan would have placed authority in the hands of the Executive Branch. But "[t]he delegates were immediately opposed to the use of force" and "[t]he Convention tabled the proposal and never seriously entertained this alternative." *Id.* at 325-26 & nn.44-47.

Second, the Virginia Plan alternatively recommended "that the National Legislature ought to be impowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." Madison, *Notes on the Constitutional Convention* (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand, ed. 1911) ("FARRAND'S RECORDS"). Under this "congressional negative" as originally proposed, Congress alone

would have had the power to "negative" all state laws that, in Congress's judgment, violated the federal Constitution. Importantly, the delegates apparently envisioned the congressional negative (by analogy to the Crown's prerogative to approve Colonial laws) as operating to *prevent* state laws from going into effect *until* Congress acted (except in special circumstances). Indeed, James Madison argued that anything other than this powerful congressional negative would be ineffective because it would allow the States to "pass laws which will accomplish their injurious objects before they can be repealed" by Congress or invalidated by the federal courts. 2 FARRAND'S RECORDS 27.

Third, the New Jersey Plan included a resolution that "was in substance and concept, if not in form, similar to the current language of the Supremacy Clause." Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2089 (2000). It "would have required state courts (subject to federal appellate review) to enforce the Laws of the United States . . . as 'the supreme law of the respective States.'" Clark, *supra*, 72 GEO. WASH. L. REV. at 327 (quoting 1 FARRAND'S RECORDS 245).

The Convention initially approved the "congressional negative" in its original form. *Id.* at 326. But Charles Pinckney "moved to expand the negative" by giving Congress the power to negate any state law that Congress regarded as "improper" (rather than merely contrary to the federal Constitution). At that point, the small-State delegates strongly objected, and the Convention not only rejected Pinckney's proposal but also "subsequently reconsidered and rejected even the original

congressional negative." *Ibid.* The congressional negative was unacceptable to a majority of States because it "would have allowed *Congress* to determine for itself the scope of its powers vis-à-vis the states." *Ibid.* (emphasis added).

"[T]he Convention subsequently adopted the Clause immediately after rejecting the congressional negative." *Id.* at 327. In so doing, the Convention rejected the arguments of James Madison (who had been the primary drafter of the Virginia Plan) that adoption of the congressional negative was "essential to the efficacy & security of the Genl. Govt." 2 FARRAND'S RECORDS 27. Disagreeing with Madison, Gouverneur Morris explained that any "law that ought to be negatived *will be set aside in the Judiciary departmt.* and if that security should fail; may be repealed by a Nationl. law." *Id.* at 28 (emphasis added). Similarly, Roger Sherman argued that the congressional negative was "unnecessary" because the state courts "would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Id.* at 27.

All of this makes clear that the Convention delegates who opposed the congressional negative did so because, among other things, they viewed it as unnecessary once the Supremacy Clause had been included in the Constitution. In other words, the Supremacy Clause was viewed as an *adequate means* of addressing the problem the congressional negative was meant to solve—namely, the possibility that States would flout federal law. See *The Federalist No. 15* (Hamilton) (noting that "*in practice* [the resolutions of the Continental Congress] are mere

recommendations which the States observe or disregard at their option" (emphasis added)). The Supremacy Clause was not understood as a mere aspiration, but rather as an affirmative guarantee that would accomplish this defining objective of the constitutional scheme.

Furthermore, the Supremacy Clause *assigned to the courts* in the first instance the duty to ensure that state laws that were inconsistent with federal laws would be accorded no effect (and thus preempted). Indeed, the specific language of the Supremacy Clause confirms the Framers' intent that it be enforced by the Judiciary. See U.S. CONST., art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The first clause establishes a hierarchy of federal law and authority; the second is expressly directed at "Judges."

As for the third clause—"any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"—scholarship has established that its form would have been understood by the Framers (and late-Eighteenth-Century judges) as a so-called "*non obstante*" clause. Such clauses were specifically *directed at courts* and understood as a directive concerning the rules of interpretation to apply to federal statutes alleged to conflict with state law. See Nelson, *supra*, 86 VA. L. REV. at 232, 235-44, 291-303. The *non obstante* form of the Supremacy Clause, then, confirms the Framers' plan to vest responsibility for interpreting and enforcing the

Supremacy Clause in the judiciary. *Id.* at 232, 245-64.

In short, the Framers expected the Supremacy Clause to prevent widespread defiance of federal law, and they expected the courts to have primary institutional responsibility for effectuating that result. As respondents demonstrate, this expectation was amply justified by the contemporary practice of suits in equity to restrain officials from unauthorized actions. *Dominguez* Resp. Br. 11-17. In allowing a cause of action for prospective relief on the grounds of preemption, this Court is simply facilitating and performing the role assigned to the judiciary by the Supremacy Clause—namely, preventing systematic violations of federal law by state officials.

While petitioners and their *amici* acknowledge that the Framers vested this responsibility in the judiciary—and specifically rejected the congressional negative proposal—they fail to apprehend the perverse consequence that rejecting a cause of action for preemption would have. In the absence of such a cause of action, asserting federal supremacy *would require congressional action*. As illustrated by this case (and the numerous examples detailed above), there are numerous instances in which federal law conflicts with state law but does not provide a statutory cause of action or an individual "right" within the ambit of 42 U.S.C. § 1983. Petitioners would require Congress to take affirmative action to supply a means to assert federal supremacy, by creating (or, in the case of § 1983, triggering) a cause of action. Petitioners would, in short, require action by the very institution (Congress) that the Framers passed over before the courts could discharge their

assigned duties under the Supremacy Clause. That is exactly backward.[4]

Indeed, many statutes do not expressly provide for a private cause of action, and this Court has been appropriately cautious in finding implied causes of action and allowing statutory claims to be brought under Section 1983. See *Cort*, 422 U.S. at 78; *Gonzaga Univ.*, 536 U.S. at 282. As noted above, these statutory causes of action are necessarily circumscribed by congressional intent. See *Davis* v. *Passman*, 442 U.S. 228, 240-41 (1979) (noting that "it is entirely appropriate" for Congress to determine who may enforce statutes, and drawing a contrast with the Constitution, where "the judiciary is clearly discernible as the primary means" of enforcement). This makes the statutory causes of action poorly suited, however, to vindicate the Constitutional interest in federal supremacy.

B. Petitioners' Rule Would Harm Businesses And Consumers And Undermine The Significant Benefits Flowing From The Preemption Doctrine

Preemption is a pervasive and highly beneficial feature of our system of government. By virtue of the Supremacy Clause and the doctrine of preemption that flows directly from it, state and local governments may not impose requirements that conflict with federal law. Both Congress and regulatory agencies also rely on preemption as a

---

[4] Relying on the Executive Branch to enforce the Supremacy Clause (see Pet. Br. 44 n.15) similarly ignores the history of the Supremacy Clause and the institutional choices made by the Framers.

crucial tool in reducing or eliminating the burdens that flow from multifarious (and even conflicting) legal and regulatory requirements imposed by 50 States and thousands of municipal and local governments. In significantly limiting the effectiveness of federal preemption, petitioners' position would undermine three crucial benefits that flow from an effective preemption regime: (1) promotion of regulatory uniformity; (2) promotion of a unified national marketplace for goods and services; and (3) enablement of national deregulatory policies. These benefits reach far beyond the statutory scheme at issue here.

1. *Regulatory uniformity.* Without the protection of preemptive federal laws, companies may be subject to inconsistent and indeed incompatible regulation by thousands of state, municipal, and local entities. Not surprisingly, Congress has repeatedly invoked the benefits of regulatory "uniformity" in enacting preemption provisions in a variety of settings—especially with regard to nationally distributed products. See, *e.g.*, Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(1) ("Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.").

The principal advantages flowing from regulatory uniformity are economic efficiencies in the manufacturing and distribution processes. As one commentator has explained in describing the origins of the preemption clause of the Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343-1, "[p]reparing different labeling, advertising, and food formulations for different states is costly" and "[i]nconsistent labeling laws can slow food manufacturing and

distribution, raise prices, and confuse consumers confronted with different information and warnings." Michele Bradley, *The States' Role in Regulating Food Labeling and Advertising: The Effect of the Nutrition Labeling and Education Act of 1990*, 49 FOOD & DRUG L.J. 649, 653 (1994). Modern manufacturing processes and distribution networks must be altered, and invariably are made less efficient, to account for regulatory variations in the markets for which the products are bound. This is further complicated where the products themselves are mobile and apt to be used in multiple jurisdictions. As a general matter, then, regulatory uniformity has the effect of decreasing the costs of production, distribution, and regulatory compliance, and thus has the potential to lower the price of goods and services for consumers.

2. *Promotion of a unified national market.* In certain cases the costs of complying with a welter of diverse or inconsistent regulatory requirements become so large that manufacturers may elect either not to serve particular markets at all or to "conform" their products "with the most restrictive applicable law." Bradley, 49 FOOD & DRUG L.J. at 654.[5] In the

---

[5] Commentators have recognized the possibility of this occurring as a result of modern product liability litigation. Thus, as Professor Michael McConnell has explained: "[S]tate-by-state determination of the law of products liability seems to have created a liability monster. This is because each state can benefit in-state plaintiffs by more generous liability rules, the costs being exported to largely out-of-state defendants; while no state can do much to protect its in-state manufacturers from suits by plaintiffs in the other states. Thus, competition among the states in this arena leads to one-sidedly pro-plaintiff rules of law." Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1499 (1987); see also Michael McConnell, *A Choice-of-Law Approach to Products-Liability*

latter scenario, the net result is that "[s]tate enforcement activities" in several or even in a single jurisdiction can have the extraterritorial effect of "regulat[ing] . . . manufacturers nationally." *Ibid.*

In enacting many preemption clauses, Congress appears to have acted out of a concern over the potential burdens imposed on the national market—and on interstate commerce—by divergent state and local regulations. Thus, Congress has allowed for limited waivers or exemptions from express preemption schemes where state or local laws that do "not unreasonably burden interstate commerce." Federal Railroad Safety Act, 49 U.S.C. § 20106(a)(2)(C); see also Hazardous Materials Transportation Act, 49 U.S.C. § 5125(e)(2); Consumer Product Safety Act, 15 U.S.C. § 2075(c)(2). The desire to protect interstate commerce against disparate state rules also undergirds various preemption clauses enacted by Congress to regulate the channels and instrumentalities of interstate commerce (such as trains, airplanes, trucks, boats, and cars). See, *e.g.*, Safety Appliance Acts, 49 U.S.C. §§ 20301-20306; Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703.

Preemption of divergent and potentially conflicting state and local requirements thus plays an important role in ensuring and protecting the development of a unified national marketplace for goods and services. Indeed, only through preemption by the federal government may the problem of

---

Reform, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988) (discussing the reasons why "the cost of a given state's liability laws, as they apply to mass-marketed products, is borne by consumers nationwide").

incompatible state and local commands be effectively addressed and remedied.

3. *Deregulation.* Whenever the federal government wishes to pursue a deregulatory approach to some area of the economy, the federal power to legislate *preemptively* is critically important. Without such authority, a nationwide program of deregulation will fall flat (except in the unlikely event that there is nationwide unanimity). Accordingly, this Court has recognized that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Electric Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983). This Court has applied that principle in various settings. See, *e.g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (holding preempted Washington state ban on large oil tankers in Puget Sound).

Moreover, Congress has repeatedly decreed this type of preemption under the federal labor laws. See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.") (internal quotation marks omitted); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947) (preemption occurs "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such

regulation is appropriate or approved pursuant to the policy of the [federal labor] statute").

Congress has also relied on this rationale in enacting preemption provisions that target certain modes of transportation. For example, the aptly-named Airline Deregulation Act of 1978 (ADA), which regulates air carriers (49 U.S.C. § 41713(b)), preempts state laws that regulate "price[s], route[s], or service." See *Morales* v. *Trans World Airlines*, 504 U.S. 374 (1992). In enacting that statute, "Congress' overarching goal" was to "help[] assure transportation rates, routes and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Rowe*, 552 U.S. at 371 (quoting *Morales*, 504 U.S. at 378). Congress has taken similar steps in deregulating the trucking industry. See *id.* at 367-68.

In sum, a well-functioning preemption regime is crucially important to businesses and consumers. By preventing widespread disregard of federal law by state officials, the Supremacy Clause cause of action vindicates the Constitutional interest in federal supremacy while also securing the considerable benefits of uniform regulation, integrated markets, and effective deregulation.

III. PETITIONERS' ATTEMPTS TO NARROW THE CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE TO EXCLUDE THIS CASE IMPROPERLY IMPORT CONCERNS THAT ARE NOT GROUNDED IN THE SUPREMACY CLAUSE, AND ARE APPROPRIATELY ADDRESSED BY STANDING RULES AND THE SUBSTANTIVE LAW OF PREEMPTION

A. The Supremacy Clause Does Not Support Petitioners' Proposed Limitation, And Standing Rules Ensure That Preemption Lawsuits Are Brought, As Here, Only By Appropriate Plaintiffs

Faced with the reality that this Court routinely entertains preemption challenges by private parties, petitioners and the United States struggle to limit this line of authority in a way that would exclude the present case. In addition to relying on inapposite lines of cases involving Section 1983 and statutory rights of action (see pages 13-16, *supra*), they contend that, if the pertinent federal statute does not specifically confer "rights" on private parties, then a cause of action should be allowed only when preemption is used "solely as a defense to state regulation of a defendant's (or putative defendant's) conduct." Pet. Br. 44; see also U.S. Br. 22 (arguing that the challenged regulations "do not regulate respondents' primary conduct"). This restriction is not grounded in the Supremacy Clause, and, in any event, it is both unnecessary and inconsistent with the Court's approach to preemption cases.

For starters, petitioners and the United States provide virtually no support for this "primary

conduct" test, presumably because neither the text nor the purpose of the Supremacy Clause admits of such a limitation. By its terms, the Supremacy Clause makes *all* federal law supreme—there is no suggestion that only "federal affirmative rights" or "federal defenses" have such force. The absence of such a textual distinction is fully consistent with the clause's purpose, which was to guarantee the priority of federal law across the board. See *supra* pp. 17-23. Nothing in the Supremacy Clause itself suggests that federal law only "sometimes" trumps inconsistent state and local regimes.

Underlying petitioners' proposed restriction is the notion that such a test would somehow serve to restrict the cause of action to an appropriate set of plaintiffs. This function, however, is already performed by standing doctrine. See *Indep. Living Ctr. of S. California, Inc.*, 543 F.3d at 1057 (noting that a similar argument made by the district court appeared simply to "reflect traditional standing doctrine"). The three "irreducible constitutional minimum" elements of standing—injury in fact, causation, and redressability—already enforce appropriate limits on those who may assert a constitutional interest in a preemption action. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102-103 (1998) (internal quotation marks omitted).

In preemption cases, the injury-in-fact and causation requirements ensure that suit can be brought only by plaintiffs who have suffered a concrete injury (such as the reductions in payments suffered by respondents in these cases) that is fairly traceable to the defendants' enforcement of allegedly preempted laws (such as petitioners' enforcement of

California's rate reductions). Importantly, because the Supremacy Clause cause of action is for prospective relief (not retrospective relief such as damages), plaintiffs can demonstrate redressability only if their injury is either ongoing or likely to recur. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). This also tends to restrict preemption lawsuits to cases like this one, where the plaintiffs are (or, in the absence of injunctive relief, will be) repeatedly and systematically injured by government action they claim is in violation of federal law.

There is simply no indication that the Court intended to restrict the class of potential preemption plaintiffs any further than this. For example, there is no reason to believe that when *Shaw* speaks of "plaintiff[s] who seek[] injunctive relief from state regulation," it means to import a "primary conduct" restriction that would exclude the respondents here, who will suffer enormous financial losses and may ultimately be forced to limit the availability of crucial health services to beneficiaries. See *Golden State Transit Corp.*, 493 U.S. at 114 (Kennedy, J., dissenting) (explaining that an "*injured party* does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system" (emphasis added)).

This Court's recent decision in *Rowe* is a particularly vivid illustration of the illogic of petitioners' position. The plaintiffs there were transport carrier associations. They argued that two provisions of Maine tobacco law were invalidated by the Federal Aviation Administration Authorization Act of 1994, which preempted state trucking

regulations. 552 U.S. at 367-68. One of these provisions regulated carriers directly, by restricting transport of tobacco into Maine. *Id.* at 369, 372. The Court held that it was preempted. *Id.* at 373. The second provision, however, did not directly regulate trucking; instead, it directed the state's tobacco *retailers* to employ only those delivery services that followed certain provisions. *Id.* at 372. The Court took note of this distinction: "We concede that the regulation here is less 'direct' than it might be, for it tells *shippers* what to choose rather than *carriers* what to do." *Ibid.* The Court went on, however, to explain the distinction was without a difference: "Nonetheless, the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate. And that being so, treating sales restrictions and purchase restrictions differently for pre-emption purposes would *make no sense*." *Ibid.* (emphasis added, internal quotation marks omitted).

In other words, the direct and indirect regulations were identical for preemption purposes, and there was no reason to treat them differently. But according to the petitioners, courts *must* treat them differently for purposes of defining the preemption *cause of action*. In petitioners' world, the truckers in *Rowe* would have had a cause of action with respect to one provision but not the other, equally preempted provision. That makes no sense: Indirect regulation can be just as injurious to affected parties and just as inimical to federal supremacy as direct regulation. Accordingly, there is no justification for exempting indirect regulation from preemption lawsuits.

B. Whether Spending Clause Legislation Should Be Treated Differently Is A Question Of Preemption Doctrine

Petitioners' final effort at restricting the scope of the Supremacy Clause cause of action is their contention that the cause of action disappears in the Spending Clause context. See Pet. Br. 46. In particular, petitioners maintain that, because Spending Clause legislation resembles a contract, any remedy for noncompliance must be supplied by the "terms of the . . . contract." *Id.* at 47. This argument is confused conceptually and groundless doctrinally. Its most basic defect, however, is that it is totally out of place: It goes to whether there is preemption, not to the existence of a cause of action to enforce the Supremacy Clause.

Conceptually, the contract argument has little to recommend it. "Conditional spending statutes are no less 'law' than any other kind of federal legislation." Samuel Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 391 (2008). The Supremacy Clause itself certainly contains no exception for laws enacted under the Spending Clause. Even though Spending Clause statutes impose obligations only on States that accept the conditional offer of funds, "that fact does not make their obligations any less binding (or any less a product of 'law') than the obligations imposed by any other federal statute." *Ibid.* This Court's jurisprudence has been entirely consistent with this principle. In particular, this Court has repeatedly held that Spending Clause statutes preempt inconsistent state legislation. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 138 (1982); *Carleson* v.

Remillard, 406 U.S. 598, 604 (1972). That is precisely what petitioners claim cannot happen. Pet Br. 47-48.

Moreover, while petitioners style this argument as a question of whether the preemption cause of action is available with respect to Spending Clause statutes, really their argument is that Spending Clause statutes are not preemptive. Indeed, petitioners give the game away right off the bat by arguing that "[p]rinciples of supremacy, *and of preemption generally*, have no application to allegations that a state has failed to satisfy a federal funding condition." Pet. Br. 46 (emphasis added); see also U.S. Br. 21 (claiming that respondents use the term preemption "in a rather special sense" (internal quotation marks omitted)). Whether or not preemption principles suggest that Spending Clause statutes should be treated differently is simply a question of the substantive law of preemption, to be resolved on the merits. In other words, petitioners' argument goes to the existence and extent of an actual conflict between federal and state law sufficient to trigger preemption. But the Supremacy Clause cause of action does not leap in and out of existence depending on whether the preemption claim is ultimately successful—the existence of a cause of action is logically antecedent to and conceptually distinct from the merits. Nor does the cause of action switch on and off depending on the Constitutional provision under which the relevant federal statute was enacted. If a statute is not preemptive, the courts can and will make that determination (by contrast, in this case, courts have definitively ruled that the relevant state and federal laws *do* stand in conflict). There is no reason to

anticipate that scenario by creating carve-outs in the Supremacy Clause cause of action.

Notably, this was precisely the approach taken by seven Members of the Court in *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003). Although seven Justices split 4-3 over the question of whether the Medicaid Act preempted Maine's rebate program, *id.* at 661-668, 669-74, 682-90, all seven recognized that this was properly a preemption issue—none questioned the availability of the private cause of action. There is no reason for the Court to adopt any other approach to this case.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ALAN UNTEREINER
Counsel of Record
MARK T. STANCIL
ALEX POTAPOV
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

August 5, 2011

RECORD
AND

Nos. 09-958, 09-1158, and 10-283

Supreme Court, U.S.
FILED
AUG 5 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

TOBY DOUGLAS,
Director, California Department of Health Services,
Petitioner,
v
INDEPENDENT LIVING CENTER
OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

TOBY DOUGLAS,
Director, California Department of Health Services,
Petitioner,
v.
CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS,
Director, California Department of Health Services,
Petitioner,
v.
SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER HHS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CHARLES S. SIMS
MATTHEW J. MORRIS
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000

STEPHEN I. VLADECK
Counsel of Record
4801 Mass. Ave., N.W.
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

Counsel for Amici Curiae

August 5, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE MEDICAID PROGRAM DEPENDS UPON THE ENFORCEABILITY OF § 30(A) 6

II. EXCLUSIVE ENFORCEMENT OF § 30(A) BY HHS IS LOGISTICALLY, PRACTICALLY, LEGALLY, AND POLITICALLY UNFEASIBLE 12

III. PRIVATE ENFORCEMENT OF § 30(A) DOES NOT MATERIALLY INTERFERE WITH THE SECRETARY'S DISCRETION 28

CONCLUSION 35

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Alaska Dep't of Health & Soc. Servs. v. *CMS*,
424 F.3d 931 (9th Cir. 2005) 31

Ark. Med. Soc'y, Inc. v. *Reynolds*,
6 F.3d 519 (8th Cir. 1993) 10, 16, 32

Arthur C. Logan Mem. Hosp. v. *Toia*,
441 F. Supp. 26 (S.D.N.Y. 1977) 23

Cal. Hosp. Ass'n v. *Obledo*,
602 F.2d 1357 (9th Cir. 1979) 13

Catholic Med. Ctr. of Brooklyn & Queens, Inc. v. *Rockefeller*,
430 F.2d 1297 (2d Cir. 1970) 13

DeGregorio v. *O'Bannon*,
500 F. Supp. 541 (E.D. Pa. 1980) 3, 9

Equal Access for El Paso v. *Hawkins*,
509 F.3d 697 (5th Cir. 2007) 12

Evergreen Presbyterian Ministries Inc. v. *Hood*,
235 F.3d 908 (5th Cir. 2000) 18

Gonzaga Univ. v. *Doe*,
536 U.S. 273 (2002) 12, 17, 23, 28

Harris v. *Olszewski*,
442 F.3d 456 (6th Cir. 2006) 31

Hosp. Ass'n of N.Y. State, Inc. v. *Toia*,
577 F.2d 790 (2d Cir. 1978) 13

Ill. Hosp. Ass'n v. *Edgar*,
765 F. Supp. 1343 (N.D. Ill. 1991) 16

In re NYASHA Litig.,
318 F. Supp. 2d 30 (N.D.N.Y. 2004), *aff'd*,
444 F.3d 147 (2d Cir. 2006) (per curiam) 17

Indep. Living Ctr. of S. Cal., Inc. v. *Shewry*,
543 F.3d 1050 (9th Cir. 2008),
cert. granted sub nom. Maxwell-Jolly v. *Indep. Living Ctr. of S. Cal., Inc.*,
131 S. Ct. 992 (2011) 34

Mass. Gen. Hosp. v. *Weiner*,
569 F.2d 1156 (1st Cir. 1978)..... 13

Minn. Ass'n of Health Care Facilities, Inc. v. *Minn. Dept. of Pub. Welfare*,
602 F.2d 150 (8th Cir. 1979) 13

Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*,
545 U.S. 967 (2005) 5, 32

New York v. *Shalala*,
119 F.3d 175 (2d Cir. 1997)..... 5, 32

Opelika Nursing Home, Inc. v. *Richardson*,
323 F. Supp. 1206 (M.D. Ala. 1971)..... 13

Orthopaedic Hosp. v *Belshe*,
103 F.3d 1491 (9th Cir. 1997) 16

Pa. Pharmacists Ass'n v. *Houstoun*,
283 F.3d 531 (3d Cir. 2002) (en banc)..... 17

Pharm. Research & Mfrs. of Am. v. *Thompson*,
362 F.3d 817 (D.C. Cir. 2004)..... 5, 31

S.D. ex rel. Dickson v. *Hood*,
391 F.3d 581 (5th Cir. 2004) 31

St. Mary's Hosp. of E. St. Louis, Inc. v. *Ogilvie*,
496 F.2d 1324 (7th Cir. 1974) 13

Thomas Jefferson Univ. v. *Shalala*,
512 U.S. 504 (1994) 31

United States v. *Mead Corp.*,
533 U.S. 218 (2001) 31

West Virginia v. *Thompson*,
475 F.3d 204 (4th Cir. 2007) 31

Wilder v. *Va. Hosp. Ass'n*,
496 U.S. 498 (1990) ..... passim

FEDERAL STATUTES

42 U.S.C. § 1315(a) 26

42 U.S.C. § 1316(a) 7, 24

42 U.S.C. § 1396a(a)(10)(A)(ii) 8

42 U.S.C. § 1396a(a)(13) 14, 16

42 U.S.C. § 1396a(a)(13)(B) 13

42 U.S.C. § 1396a(a)(30)(A) ..... passim

42 U.S.C. § 1396a(b) 7

42 U.S.C. § 1396c 7, 8, 24

42 U.S.C. § 1396d(b) 7

42 U.S.C. § 1983 ..... 15, 17, 23, 29

Balanced Budget Act of 1997,
Pub. L. No. 105-33, 111 Stat. 251 17

Omnibus Budget Reconciliation Act of 1980,
Pub. L. No. 96-499, 94 Stat. 2599 14

Omnibus Budget Reconciliation Act of 1989,
Pub. L. No. 101-239, 103 Stat. 2106 9

Social Security Amendments of 1965,
Pub. L. No. 89-97, 79 Stat. 286 ..... 6, 8

REGULATIONS AND ADMINISTRATIVE MATERIALS

42 C.F.R. § 430.0 6

42 C.F.R. § 430.15 7

42 C.F.R. § 430.35 8

42 C.F.R. § 433.10(b) 7

42 C.F.R. § 447.204 9

45 C.F.R. § 250.30(a)(5) 3, 9

Medicaid Regulations,
43 FED. REG. 45,176 (Sept. 29, 1978) 9

64 FED. REG. 54,263 (Oct. 6, 1999) 18

Medicaid Program; Methods for Assuring
Access to Covered Medicaid Services,
76 FED. REG. 26,342 (May 6, 2011) 20, 25

CTRS. FOR MEDICARE & MEDICAID SERVS.,
CMS FINANCIAL REPORT: FISCAL YEAR 2008 (2009),
https://www.cms.gov/CFOReport/Downloads/
2008_CMS_Financial_Report.pdf 22

CTRS. FOR MEDICARE & MEDICAID SERVS., CMS FINANCIAL REPORT: FISCAL YEAR 2010 (2011), https://www.cms.gov/CFOReport/Downloads/2010_CMS_Financial_Report.pdf 22

Medicaid Reimbursement & Finance, CMS.gov, http://www.cms.gov/MedicaidRF/ 8

LEGISLATIVE MATERIALS

H.R. REP. No. 97-158 (1981) 14, 15

H.R. REP. No. 101-247 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2060 ..... 3, 9, 10

H.R. REP. No. 105-149 (1997) 17

Hearing on the Unanimous Bipartisan National Governors Association Agreement on Medicaid, Hearing Before the House Comm. on Commerce, 104th Cong., 2d Sess. (1996) 11, 30

Medicaid and Welfare Reform, Hearing Before the S. Comm. on Finance, 104th Cong., 2d Sess. (1996) 18

Medicare and Medicaid, Hearings Before the S. Comm. on Finance, 91st Cong., 2d Sess. (1970) 6

Medicare and Medicaid Initiatives, Hearings before the Subcomm. on Health and the Envt. of the House Comm. on Energy and Commerce, 101st Cong, 1st Sess. (1989) 10

LEGAL MEMORANDA

Brief for Respondents,
Alaska Dep't of Health & Soc. Servs. v. *CMS*,
424 F.3d 931 (9th Cir. 2005) (No. 04-74204) 18

Brief for the United States as Amicus Curiae
Supporting Petitioner,
Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*,
No. 09-958 (U.S. filed May 26, 2011) .....passim

Brief for the United States as Amicus Curiae
Supporting Petitioners,
Wilder v. *Va. Hosp. Ass'n*,
496 U.S. 498 (1990) (No. 88-2043) 29, 30

Brief of Amicus Curiae Secretary of Health &
Human Services,
Clark v. *Kizer*,
758 F. Supp. 572 (E.D. Cal. 1990) (No. 87-1700).. 25

Statement of Interest of the United States,
Planned Parenthood of Ind., Inc. v.
Comm'r of the Ind. State Dep't of Pub. Health,
No. 11-cv-630 (S.D. Ind. June 16, 2011) 25, 34

United States' Brief as *Amicus Curiae*,
Exeter Mem. Hosp. Ass'n v. *Belshe*,
943 F. Supp. 1239 (E.D. Cal. 1996)
(No. 96-693)..... 16, 24, 33, 34

OTHER AUTHORITIES

Joanna Bisgaier & Karrin V. Rhodes,
Auditing Access to Specialty Care
for Children With Public Insurance,
364 NEW ENG. J. MED. 2324 (2011) 11

Brian J. Dunne,
Comment, *Enforcement of the Medicaid Act Under 42 USC § 1983 After* Gonzaga University v Doe: *The "Dispassionate Lens" Examined*,
74 U. CHI. L. REV. 991 (2007) 23

Michael A. Fletcher,
GOP Governors Push Back Against Obama on Federal Medicaid Rules,
WASH. POST, June 15, 2011, at A1 ..... 26, 27

Denise Grady,
Children on Medicaid Shown To Wait Longer for Care,
N.Y. TIMES, June 15, 2011, at A24 10

Malcolm J. Harkins III,
Be Careful What You Ask For: The Repeal of the Boren Amendment and Continuing Federal Responsibility To Assure that State Medicaid Programs Pay for Cost Effective Quality Nursing Facility Care,
4 J. HEALTH CARE L. & POL'Y 159 (2001) 15

Nicole Huberfeld,
Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements,
42 U.C. DAVIS L. REV. 413 (2008) 20

Jerry L. Mashaw & Dylan S. Calsyn,
Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain,
14 YALE L. & POL'Y REV. 297 (1996) 27

Edward Alan Miller,
Federal Administrative and Judicial Oversight of Medicaid: Policy Legacies and Tandem Institutions Under the Boren Amendment,
38 PUBLIUS 315 (2008) 15, 18

Abigail R. Moncrieff,
The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law,
90 B.U. L. REV. 2323 (2010) 20, 25

Abigail R. Moncrieff,
Comment, *Payments to Medicaid Doctors: Interpreting the "Equal Access" Provision*,
73 U. CHI. L. REV. 673 (2006) 10, 11

Judith M. Rosenberg & David T. Zaring,
Recent Development, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*,
32 HARV. J. ON LEGIS. 545 (1995) 26

PAUL STARR,
THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982) 6

Edward A. Tomlinson & Jerry L. Mashaw,
The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement,
58 VA. L. REV. 600 (1972) 23

Sidney D. Watson,
Medicaid Physician Participation: Patients, Poverty, and Physician Self-Interest,
21 AM. J.L. & MED. 191 (1995) 6, 11

INTRODUCTION

The petition involves the validity of a state law that was only on the books for eight months, and that expired more than a year ago, in February 2009. That state law imposed a ten percent across-the-board reduction to Medicaid rates for providers of medical services and other health care providers, to the detriment of their patients. That state law has been submitted to the federal Department of Health and Human Services for approval, but that process has been stalled by petitioner's failure to respond to the federal government's requests for additional information.

The court of appeals correctly concluded, consistent with the settled practice of this Court and all the regional courts of appeals, that respondents could bring suit in federal court seeking an injunction to bar a state official from enforcing a preempted state law. Such suits give life to the Supremacy Clause.

The court of appeals also correctly concluded that the district court did not abuse its discretion in finding that respondents had established a likelihood of success on the merits of their claim that the federal Medicaid Act preempted the challenged state law. No court in the 45-year history of the Medicaid program has interpreted the Act to allow wholly budget-driven reductions to Medicaid rates without consideration of the effect of the reductions on efficiency, economy, and quality of care, or whether the reduced rates were

congressional intent and would interfere with the Secretary's discretion to administer the Medicaid program. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, No. 09-958 (U.S. filed May 26, 2011) [hereinafter "Gov't Br."].

As *amici* explain below, HHS has never embraced such a view of private enforcement. To the contrary, it has consistently been HHS's position that private enforcement of § 30(A) is not just appropriate, but also necessary to ensure that states comply with this critical regulatory mandate. Nor is there anything to the Justice Department's suggestion that private enforcement would interfere with the Secretary's discretion. As a matter of both historical practice and current law, private enforcement only complements the Secretary's authority.

SUMMARY OF ARGUMENT

Since its inception in 1965, the central purpose of the Medicaid program has been to provide access to "mainstream" health care for those who cannot afford to purchase private medical services. To that end, of

---

> A State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

42 U.S.C. § 1396a(a)(30)(A).

the almost 100 procedural and substantive requirements that the Medicaid Act imposes on state plans, perhaps none is more vital than the "equal access" mandate presently codified in § 30(A), which has its roots in a 1966 HEW Handbook delineating requirements for state Medicaid plans, and a regulation (45 C.F.R. § 250.30(a)(5)) first promulgated by HEW in 1971. *See DeGregorio* v. *O'Bannon*, 500 F. Supp. 541, 549 & n.13 (E.D. Pa. 1980). And as § 30(A)'s legislative history makes clear, the equal access provision exists to ensure that providers will not refuse to treat Medicaid beneficiaries due to inadequate state reimbursement rates. *See, e.g.*, H.R. REP. NO. 101-247, at 390 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2060, 2116. After all, without meaningful enforcement of the equal access provision, states would have little incentive to reimburse providers at mainstream rates, and providers would in turn have little incentive to treat Medicaid beneficiaries.

Despite its agreement with these basic principles, the Justice Department's *amicus* brief maintains that private enforcement of the equal access provision is inconsistent with the statutory scheme, implicitly suggesting that Congress intended for the provision to be enforced exclusively by HHS. *See, e.g.*, Gov't Br., *supra*, at 12. But exclusive administrative enforcement of § 30(A) is logistically, practically, legally, and politically unfeasible. First, because the Medicaid Act contemplated—and has historically been understood to allow—direct redress by beneficiaries, neither CMS nor HHS has the resources to provide comprehensive oversight of state-by-state compliance with the equal access provision. Second, because funds for the

administration of Medicaid are provided by appropriation, they are subject to far greater congressional budget constraints than Medicaid benefits. Third, as CMS itself has repeatedly conceded, it is limited both practically and legally in its authority to both enforce § 30(A) and provide remedies for violations thereof. Fourth, and finally, even in the absence of such constraints, the "cooperative federalism" behind Medicaid means that the Executive Branch is under far more political pressure from states than from private parties.

None of these points are unique to the equal access mandate—or to the Medicaid Act more generally. But taken together, they reinforce the general proposition that the federal government lacks the financial, legal, logistical, and political wherewithal comprehensively to enforce § 30(A) against the states. Thus, whereas the Department of Justice suggests that "Recognition of a nonstatutory cause of action for Medicaid providers and beneficiaries in this setting would be in tension with the nature of the federal-state relationship and the enforcement scheme contemplated by the statute," Gov't Br., *supra*, at 25, the reality is that *exclusive* federal enforcement would be in far greater tension with the scheme Congress intended and HHS has historically supported and embraced, if for no other reason than that it would not—and probably cannot—produce meaningful compliance with the Medicaid Act's access mandate.

In the alternative, the Justice Department's *amicus* brief suggests that private enforcement of the equal access provision would interfere with the Secretary's discretion in administering the Medicaid program. *See* Gov't Br., *supra*, at 32. The federal

government has never previously opposed private enforcement of the equal access provision on the ground that it would interfere with the Secretary's authority to administer the Medicaid program. In cases in which § 30(A) is ambiguous, the Secretary's reasonable interpretation thereof will generally be entitled to *Chevron* deference. *See, e.g.*, *Pharm. Research & Mfrs. of Am.* v. *Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004). As a result, she would not be bound by prior judicial decisions holding that particular state plan amendments do or do not violate § 30(A) in cases in which the statute is held to be ambiguous. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Moreover, a judicial decision upholding or invalidating a state plan amendment based upon an interpretation of ambiguous language within § 30(A) would not preclude the state from submitting either that amendment or a revised one to the Secretary for approval. *See, e.g.*, *New York* v. *Shalala*, 119 F.3d 175, 180–81 (2d Cir. 1997). Private enforcement therefore provides a means for meaningful statutory enforcement both until and unless the Secretary has the opportunity to exercise her discretion, and to ensure that the Secretary is acting within her discretion. Ultimately, then, private enforcement may even expand the Secretary's discretion by providing a means of ensuring state compliance with the equal access mandate that is far less draconian than the specific remedies directly available to the Secretary. This understanding has been the cornerstone of HHS policy throughout the history of the Medicaid Act, and remains the prevailing view of those charged with administering the program.

ARGUMENT

I. THE MEDICAID PROGRAM DEPENDS UPON THE ENFORCEABILITY OF § 30(A)

a. The Central Purpose of Medicaid is To Provide Access to "Mainstream" Health Care for Those Who Cannot Afford Private Medical Services

In the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, Congress created the Medicare and Medicaid programs with the express goal of providing "mainstream" health care services for those individuals unlikely to have access to such services on the private market—including children, the elderly, those with certain disabilities, and the poor. *See, e.g.*, *Medicare and Medicaid*, Hearings Before the S. Comm. on Finance, 91st Cong., 2d Sess., pt. I, at 57 (1970) (statement of Hon. John G. Veneman, Under-Secretary, Department of Health, Education, and Welfare); *see also* 42 C.F.R. § 430.0 (2011) (describing purpose of the Medicaid program).

Medicaid was specifically designed to eliminate—or at least ameliorate—the "dual-track" system then in effect, pursuant to which those of means received medical care from private physicians, whereas those who could not afford such treatment received care in ambulatory clinics and emergency rooms, if at all. *See* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 151–52 (1982); Sidney D. Watson, *Medicaid Physician Participation: Patients, Poverty, and Physician Self-Interest*, 21 AM. J.L. & MED. 191, 192–93 (1995). Thus, it is no overstatement to suggest that meaningful access to mainstream medical services is the linchpin of the Medicaid regime.

Congress sought to effectuate this access goal by authorizing open-ended federal grants to states subject to a series of complex and interlocking procedural and substantive conditions. In short, states that choose to participate (as all have)[4] must submit a detailed "plan for medical assistance" that comprehensively outlines the nature and scope of the state's Medicaid program. If that plan is approved, the state becomes entitled under the Medicaid Act to "reimbursement" of a substantial percentage of its outlays (the "FFP," or federal financial participation), which varies based on state economic circumstances between the statutory floor (50%) and ceiling (83%). *See* 42 U.S.C. § 1396d(b); 42 C.F.R. § 433.10(b) (2011). *See generally Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (describing the structure of the Medicaid program).

As a result of this statutory structure, the Secretary of HHS has two direct means of ensuring state compliance with the Medicaid Act's procedural and substantive requirements: She must decline to approve state plans (or amendments thereto) ex ante, including amendments that change reimbursement policies, if they fail to comport with the Act or with regulations promulgated under it. *See* 42 U.S.C. §§ 1396a(b), 1396c; 42 C.F.R. § 430.15. And even if the plan or the relevant amendment thereto has been approved, she may also initiate an ex post "compliance" proceeding pursuant to 42 U.S.C. § 1316(a) if the state plan either on its face or as applied no longer complies with the Act. The

---

4. Including the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, there are 56 different jurisdictions currently participating in the Medicaid program.

compliance proceeding in turn could produce termination of FFP either for entire categories of state assistance, or, in the extreme, for the entire state Medicaid program. *See* 42 U.S.C. § 1396c; 42 C.F.R. § 430.35.

b. Section 30(A) Exists To Ensure that Providers Will Not Refuse To Treat Medicaid Beneficiaries Due To Inadequate Reimbursement Rates

Of the almost 100 procedural and substantive requirements that the Medicaid Act imposes on state plans, perhaps none is more central to Medicaid's access-oriented goal than the "equal access" mandate presently codified in § 30(A).[5] Although the equal access language did not appear in the original text of the Medicaid Act, Congress did initially require state Medicaid plans to "provide that the medical assistance made available to individuals receiving aid or assistance under any such State plan . . . shall not be less in amount, duration, or scope than the medical or remedial care or services made available to individuals not receiving aid or assistance under any such plan." Social Security Amendments of 1965, § 121(a), 79 Stat. at 345 (formerly codified at 42 U.S.C. § 1396a(a)(10)(A)(ii)).

To that end, since immediately after the enactment of the Medicaid Act, HEW (and later

---

5. Even the CMS website provides in the first sentence of its "Overview" of state plan reimbursement that "CMS reviews State plan amendment reimbursement methodologies for services provided under the State plan for consistency with Section 1902(a)(30)(A) of the Social Security Act (the Act) and *other* applicable federal statutes and regulations." Medicaid Reimbursement & Finance, CMS.gov, http://www.cms.gov/MedicaidRF/ (emphasis added).

HHS) interpreted the statute to require that states maintain adequate reimbursement levels for covered services. *See* 42 C.F.R. § 447.204 (2011) ("The agency's payments must be sufficient to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services are available to the general population."). While § 447.204 itself was not promulgated until 1978, its roots date back to a 1966 HEW Handbook delineating requirements for state Medicaid plans, and to a regulation (45 C.F.R. § 250.30(a)(5)) first promulgated in 1971. *See DeGregorio* v. *O'Bannon*, 500 F. Supp. 541, 549 & n.13 (E.D. Pa. 1980) (tracing this evolution); *see also* Medicaid Regulations, 43 FED. REG. 45,176, 45,258 (Sept. 29, 1978).

Nevertheless, worried that the regulatory equal access mandate was being under-enforced, Congress in 1989 went one step further, formally codifying the equal access language in § 30(A) as part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260. As the authoritative House Budget Committee Report accompanying the Act noted,

> The Committee recognizes that payment levels are only one determinant of physician participation [in Medicaid]. However, the Committee believes that, without adequate payment levels, it is simply unrealistic to expect physicians to participate in the program . . . .

H.R. REP. NO. 101-247, at 390 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2060, 2116. *See generally Ark. Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 526 (8th Cir.

1993) (discussing the purpose and significance of the 1989 amendment to § 30(A)).

Congress in 1989 thereby made explicit what HEW and HHS had assumed since 1966: to vindicate its central goal, the Medicaid program requires that states reimburse providers at reasonable rates—not because beneficiaries should be entitled to dollar-for-dollar parity in the funding of their health care, but because they are entitled by statute to equal access to *providers*, virtually none of whom would participate in Medicaid if they would only be reimbursed at inadequate levels. *See* Abigail R. Moncrieff, Comment, *Payments to Medicaid Doctors: Interpreting the "Equal Access" Provision*, 73 U. CHI. L. REV. 673, 686 (2006) [hereinafter "Moncrieff, *Interpreting the "Equal Access" Provision*"].

Indeed, the 1989 amendment to § 30(A) was prompted by the jointly shared sentiment expressed by the National Governors Association, Congress, and HHS that the Medicaid Act had not yet succeeded in eliminating the "dual-track" system that had prompted the program in the first place. *See* H.R. REP. NO. 101-247, at 390, *reprinted in* 1989 U.S.C.C.A.N. at 2116; *see also Medicare and Medicaid Initiatives*, Hearings before the Subcomm. on Health and the Envt. of the House Comm. on Energy and Commerce, 101st Cong, 1st Sess. 108 (1989) (statement of Richard N. Jensen, National Governors' Association).

Inasmuch as one could offer a comparable critique today, *see, e.g.*, Denise Grady, *Children on Medicaid Shown To Wait Longer for Care*, N.Y. TIMES, June 15, 2011, at A24 (citing Joanna Bisgaier & Karrin V. Rhodes, *Auditing Access to Specialty Care for Children With Public Insurance*, 364 NEW ENG. J.

MED. 2324 (2011)), two points nevertheless bear mention: First, the 1989 amendment *has* helped. *See, e.g.*, Watson, *supra*, at 200 (noting a fifteen-percent increase in state reimbursement rates for physicians in the first few years after the amendment).

Second, and in any event, Congress in 1989 underscored the extent to which the central purpose of the Medicaid program would be jeopardized without equal access, since states would otherwise have little incentive to set reimbursement rates at market levels, and providers, in turn, would have little incentive to offer services at the resulting reimbursement rates. *See* Moncrieff, *Interpreting the Equal Access Provision*, *supra*, at 686 ("Although it would be controversial to claim that § 30(A) requires rate parity, the provision's legislative history indicates that Congress intended to require a closer relationship between Medicaid rates and private-market rates than existed in 1989." (footnote omitted)).

To that end, the goal of the 1989 amendment was not merely to codify the equal access mandate in the abstract, but, in the process, to make it more likely that the mandate would be meaningfully enforced. As Secretary Shalala testified before the House Commerce Committee in 1996, "[i]mplicit in the concept of defined populations and defined benefits is the notion of a meaningful enforcement mechanism." *Hearing on the Unanimous Bipartisan National Governors Association Agreement on Medicaid*, Hearing Before the House Comm. on Commerce, 104th Cong., 2d Sess. (1996) (statement of Hon. Donna E. Shalala) [hereinafter "*NGA Agreement* Hearing"].

II. EXCLUSIVE ENFORCEMENT OF § 30(A) BY HHS IS LOGISTICALLY, PRACTICALLY, LEGALLY, AND POLITICALLY UNFEASIBLE

In its *amicus* brief in support of the Petitioner, the Justice Department does not dispute any of the above. Nor does it question the signal importance of the equal access mandate to the Medicaid program more generally. *See, e.g.*, Gov't Br., *supra*, at 12 ("It is essential under [§ 30(A)] that States carefully consider what impact payment rate changes may have on the availability of providers sufficient to furnish covered care and services to Medicaid beneficiaries.").

What the brief neglects, though, is both the well-established history of the Medicaid Act (within which private enforcement has figured prominently in ensuring adherence to the equal access mandate), and the extent to which that history has influenced the federal government's direct enforcement ability. And notwithstanding that this history has been given short shrift by lower-court decisions concerning the private enforceability of § 30(A) after *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002), *see, e.g.*, *Equal Access for El Paso* v. *Hawkins*, 509 F.3d 697 (5th Cir. 2007), the fact remains that both the history and present structure of the Medicaid program stand in marked contrast to the arguments offered by the Justice Department in this case.

a. Private Enforcement of § 30(A) Is Wholly Consistent With the Structure and History of the Medicaid Act

Under the Medicaid Act as initially enacted, there was no question that the statute contemplated tandem enforcement of the Act's central procedural

and substantive requirements by the Secretary and by private plaintiffs—including providers and beneficiaries. As testament to that understanding, dozens of suits were brought during the first 15 years under the Medicaid program in which private litigants sought to enforce those provisions requiring states to reimburse providers on a "reasonable cost related basis," such as § 13(B) (as amended in 1972).[6]

Section 30(A) itself was not originally subject to private enforcement, but that was because at the time, it imposed a ceiling on reimbursement rates, and not a floor, *see, e.g.*, *Opelika Nursing Home, Inc.* v. *Richardson*, 323 F. Supp. 1206, 1210–11 (M.D. Ala. 1971), and not because private enforcement was in any way disfavored. To the contrary, suits in which beneficiaries and providers sought to enforce the floor imposed by the "reasonable cost" provisions were legion, *see Wilder*, 496 U.S. at 516 & n.14 (noting examples), even as searching federal review of state plans expanded. Thus, "it is clear that prior to the passage of the Boren Amendment, Congress intended that health care providers be able to sue in federal court for injunctive relief to ensure that they were reimbursed according to reasonable rates." *Id.* at 516. And as the *Wilder* Court emphasized, HEW policy throughout the 1970s reflected (and supported) this view of the availability and utility of concurrent

---

6. For exemplar cases, see *Cal. Hosp. Ass'n* v. *Obledo*, 602 F.2d 1357, 1358 (9th Cir. 1979); *Minn. Ass'n of Health Care Facilities, Inc.* v. *Minn. Dept. of Pub. Welfare*, 602 F.2d 150, 152 (8th Cir. 1979); *Hosp. Ass'n of N.Y. State, Inc.* v. *Toia*, 577 F.2d 790, 792 (2d Cir. 1978); *Mass. Gen. Hosp.* v. *Weiner*, 569 F.2d 1156, 1157 (1st Cir. 1978); *St. Mary's Hosp. of E. St. Louis, Inc.* v. *Ogilvie*, 496 F.2d 1324, 1326–28 (7th Cir. 1974); and *Catholic Med. Ctr. of Brooklyn & Queens, Inc.* v. *Rockefeller*, 430 F.2d 1297, 1298 (2d Cir. 1970).

enforcement. *See id.* at 518 n.15 (citing legislative testimony and other official agency statements).

Largely in response to the increase in both private litigation and federal administrative oversight, Congress altered the status quo in 1980 by enacting the Boren Amendment, Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, § 962(a), 94 Stat. 2599, 2650–51 (formerly codified at 42 U.S.C. § 1396a(a)(13)).[7] The Boren Amendment, along with additional provisions enacted in 1981, rewrote § 13 of the Medicaid Act with the general goal of providing greater flexibility to the states to set payments for inpatient services. *See* H.R. REP. NO. 97-158, at 293 (1981). *See generally* Malcolm J. Harkins III, *Be Careful What You Ask For: The*

---

7. In pertinent part, the Boren Amendment rewrote § 13(A) to provide that:

> [A] State plan for medical assistance must . . . provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded . . . through the use of rates (determined in accordance with the methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary*, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to inpatient hospital services of adequate quality . . . .

42 U.S.C. § 1396a(a)(13)(A) (1981) (emphasis added).

Repeal of the Boren Amendment and Continuing Federal Responsibility To Assure that State Medicaid Programs Pay for Cost Effective Quality Nursing Facility Care, 4 J. HEALTH CARE L. & POL'Y 159, 168–78 (2001) (summarizing the Boren Amendment's origins and legislative history).

At its core, the Boren Amendment "transferred to the states the primary authority and responsibility, previously exercised by [HHS] for determining and assuring that Medicaid payment rates complied with the substantive standards of the Medicaid Act." Harkins, *supra*, at 159. And yet, although Congress thereby intended to minimize the federal government's role in ensuring that state plans complied with certain aspects of the Medicaid Act, the legislative history was just as clear that Congress meant for private judicial enforcement to remain as the backstop. As the House Budget Committee concluded, "Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action." H.R. REP. NO. 97-158, at 301; *see also* Edward Alan Miller, *Federal Administrative and Judicial Oversight of Medicaid: Policy Legacies and Tandem Institutions Under the Boren Amendment*, 38 PUBLIUS 315, 321–26 (2008) (summarizing the widespread private judicial enforcement of the Boren Amendment and its effects).

This Court relied on that understanding in *Wilder*, which held that the language of the Boren Amendment and its history manifested a clear congressional intent to create a substantive federal right privately enforceable by health care providers via 42 U.S.C. § 1983. *See* 496 U.S. at 512–20.

Although *Wilder* concerned only § 13 of the Medicaid Act, the Court's analysis is telling here for two distinct—but related—reasons. First, the Court reaffirmed the relationship between private suits and state adherence to the Medicaid Act's substantive standards. *See, e.g., id.* at 515 ("In passing the Boren Amendment, Congress sought to decentralize the method for determining rates, but not to eliminate a State's fundamental obligation to pay reasonable rates."). Second, because the "equal access" language codified in 1989 was designed with the Boren Amendment very much in mind, courts viewed the private enforceability of § 30(A) as following from *Wilder*'s analysis of § 13. *See, e.g., Orthopaedic Hosp.* v *Belshe*, 103 F.3d 1491, 1498–99 (9th Cir. 1997); *Ark. Med. Soc'y*, 6 F.3d at 525–28; *see also Ill. Hosp. Ass'n* v. *Edgar*, 765 F. Supp. 1343, 1349 (N.D. Ill. 1991) ("Section 1396a(a)(30) appears to complement the Boren Amendment . . . .").

Wilder's reading of the Boren Amendment thereby reinforced what had consistently been HHS's position: whatever degree of oversight the Secretary was supposed to exercise over state plans, private enforcement remained the safety valve for ensuring state adherence to the rate minima within the Medicaid Act, including the "equal access" language in § 30(A). *See, e.g.*, United States' Brief as *Amicus Curiae* at 8, *Exeter Mem. Hosp. Ass'n* v. *Belshe*, 943 F. Supp. 1239 (E.D. Cal. 1996) (No. 96-693) [hereinafter *"Exeter* Amicus Br."] ("Under [*Wilder*] and its progeny, a State that implements a pending [plan amendment] assumes the risk that, in addition to actions that HCFA may take, providers may bring suit challenging the State's payment rates or seeking to enjoin the State's implementation of the

[amendment] for failure to comply with the substantive or procedural requirements of the statute and regulations." (citation omitted)).

To be sure, when Congress repealed the Boren Amendment in the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507–08, some of the legislative history reflected hostility to such private enforcement. *See, e.g.*, H.R. REP. NO. 105-149, at 591 (1997) ("It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of [§ 1396] will be interpreted as establishing a cause of action for *hospitals and nursing facilities* relative to the adequacy of the rates they receive." (emphasis added)).

But even if this legislative history could govern given the absence of statutory text to that effect, *see, e.g.*, *In re NYASHA Litig.*, 318 F. Supp. 2d 30, 32 (N.D.N.Y. 2004) (noting that § 30(A) "was not affected by repeal of the Boren Amendment"), *aff'd*, 444 F.3d 147 (2d Cir. 2006) (per curiam), Congress nevertheless left intact private suits by *other* providers (the Medicaid Act identifies almost two dozen classes of eligible providers besides nursing homes and hospitals), and, more fundamentally, by beneficiaries. To that end, pre-*Gonzaga* case law barring providers from enforcing § 30(A) via § 1983 turned on the assumption that beneficiaries could still sue after the repeal of the Boren Amendment—indeed, that the availability of beneficiary suits rendered provider suits superfluous. *See, e.g.*, *Pa. Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531, 543–44 (3d Cir. 2002) (en banc) (Alito, J.) ("Not only is HHS responsible for ensuring that state plans are administered in accordance with these requirements,

but Medicaid recipients plainly satisfy the intended-to-benefit requirement and are thus potential private plaintiffs." (citation omitted)); *see also Evergreen Presbyterian Ministries Inc.* v. *Hood*, 235 F.3d 908, 928–29 & n.26 (5th Cir. 2000).

HHS took a similar view at the time, *see, e.g.*, *Medicaid and Welfare Reform*, Hearing Before the S. Comm. on Finance, 104th Cong., 2d Sess. (1996) (statement of Hon. Donna E. Shalala) (suggesting that repealing the Boren Amendment "resolves states' concern about their exposure to providers' suits in Federal court, and does not undermine beneficiaries' ability to enforce their Federal guarantee to coverage and benefits"),[8] and has continued to adhere thereto, *see, e.g.*, Brief for Respondents at 36, *Alaska Dep't of Health & Soc. Servs.* v. *CMS*, 424 F.3d 931 (9th Cir. 2005) (No. 04-74204) (advancing CMS's position that the repeal of the Boren Amendment did not affect the meaning or enforceability of § 30(A)).

b. As a Result, Neither CMS Nor HHS Has the Resources To Provide

---

8. In addition to Secretary Shalala's testimony, HCFA in 1999 proposed a new rule that would have based plan amendment approval "on simple assurances that a public process had been used when adopting reimbursement policy changes," Miller, *supra*, at 328, all-but conceding that private litigation—rather than rigorous administrative oversight—had become the principal means for enforcing § 30(A). *See* 64 FED. REG. 54,263 (Oct. 6, 1999); *see also* Miller, *supra*, at 328 (citing a 1997 letter by Sally Richardson, HCFA's Director of the Center for Medicaid and State Operations, for the proposition that "HCFA sought to minimize its role in reviewing state plan amendments governing reimbursement beyond even the minimal standards established by Boren," resulting in that much more of a focus on private enforcement).

Comprehensive Oversight of State-by-State Compliance With § 30(A)

Although the above history demonstrates the extent to which both Congress and HHS have always viewed private enforcement (by beneficiaries, at a minimum) as key to the Medicaid regime, the history matters for a separate, but equally important, reason: *Because* private enforcement was historically available under the Medicaid Act, HHS was never faced with the specter of exclusive enforcement authority, and could instead rely on the availability of private enforcement to supplement—if not supplant—its own responsibilities. Thus, fewer than 500 federal employees are today tasked with supervising 56 different Medicaid programs administering nearly $400 billion in federal funds every year. Out of necessity, most of those employees are concerned with bookkeeping and routine financial management of Medicaid funds at the state level, and not with reviewing state plans and plan amendments for compliance with § 30(A).

Indeed, as Professor Moncrieff has explained, partly *because* private enforcement was routinely available (and championed by HEW and HHS), the government has itself never aggressively sought to enforce the equal access mandate, or to obtain the necessary financial and administrative resources to do so. Instead,

> CMS tends to rubber-stamp state plans and to pass the buck to state agencies when providers and beneficiaries complain. In fact, CMS directs more of its Medicaid resources to policing individual providers' compliance with Medicaid fraud and abuse laws than

> policing state agencies' compliance with the federal statute. On the occasions that CMS does reject state plans or insist on amendments thereto, it almost always does so to protect its own funds from perceived state raids.

Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2340–41 (2010) [hereinafter "Moncrieff, *Assault on Litigation*"] (footnotes omitted); *see also* Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 466 (2008) (documenting CMS's focus on fraud prevention in lieu of access enforcement).[9]

Even a proposed new CMS rule interpreting § 30(A) recognizes the inability of CMS to provide for comprehensive enforcement. Thus, the new rule would require states to conduct their *own* periodic "access reviews," and to submit the results of such reviews "prior to submission of a [plan amendment] to reduce rates or alter the structure of provider payment rates in circumstances that could result in access issues for a covered service." Medicaid Program; Methods for Assuring Access to Covered Medicaid Services, 76 FED. REG. 26,342, 26,345 (May 6, 2011). Moreover, the new rule would allow states

---

9. In addition, "CMS has never developed a robust administrative remedy for individuals wanting to challenge CMS approval of Medicaid plans. Although some administrative processes exist for raising challenges to Medicaid plans, including challenges to reimbursement rates, Medicaid's administrative process (unlike Medicare's) has never been an effective means of enforcing the federal statute." Moncrieff *Assault on Litigation*, *supra*, at 2341 (footnotes omitted).

to avoid compliance actions by developing their own "corrective action plans" when access issues are identified, which CMS "would not treat . . . as a finding of non-compliance, but as evidence of a good faith effort by the State to remain in compliance." *Id.* at 26,347. If CMS had the resources to provide for such oversight at the federal level, the provision of such fox-guarding-the-henhouse incentives to states to self-monitor would hardly be necessary.

c. Because Funds for the Administration of Medicaid are Provided by Appropriation, They Are Subject to Far Greater Congressional Budget Constraints

Even if CMS preferred to prioritize federal enforcement of the equal access mandate, it would encounter the additional hurdle that its enforcement budget—unlike the reimbursements that comprise FFP—must be appropriated on an annual basis. Under current budgetary rules, the administrative expenses of Medicare and Medicaid, like some but not all federal social insurance programs, are classified as "discretionary" spending, in contrast to funding of Medicaid *services*, which is classified as "mandatory" spending.

As a result, CMS must request funds annually to administer Medicaid, competing with the National Institutes of Health, the Food and Drug Administration, the Centers for Disease Control, and other HHS agencies that typically are far more popular subjects of legislative munificence. Thus, according to CMS's own certified report, the funds available for federal administration of Medicaid during the most recent fiscal year totaled roughly $141 million (less than $2.10 per beneficiary),

whereas total program outlays totaled $382 billion. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., CMS FINANCIAL REPORT: FISCAL YEAR 2010, at 8, 52 (2011), https://www.cms.gov/CFOReport/Downloads/2010_CMS_Financial_Report.pdf. In other words, administrative expenses represented less than four-hundredths of one percent of total program costs.

As the CMS reports indicate, for most of the last two decades, program outlays have grown at a proportionately—as well as absolutely—higher rate than administrative budgets.[10] Thus, even if CMS made increased administrative enforcement of § 30(A) (to say nothing of the rest of the Medicaid Act) a priority, the reality of the current budget deficit renders it unlikely that the agency would be able to expand its enforcement ability.

d. CMS is Limited Both Practically and Legally in its Authority To Enforce § 30(A) and To Provide Remedies for Violations Thereof

At a more fundamental level, though, the principal obstacle to meaningful federal enforcement of the equal access mandate is neither logistical nor financial, but practical. As is true of any federal grant-in-aid program, "the posture of the federal agency toward its grantees is not generally that of a referee calling fouls, but that of a coach giving support in the form of cash and expertise." Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement*

---

10. Over the last three years alone, expenditures for Medicaid administration *declined* by 44%, from $253 million for FY2008. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., CMS FINANCIAL REPORT: FISCAL YEAR 2008, at 46 (2009), https://www.cms.gov/CFOReport/Downloads/2008_CMS_Financial_Report.pdf.

of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement, 58 VA. L. REV. 600, 620 (1972).

Medicaid is hardly unique in this regard, but "[t]his general reluctance by federal agencies to police states by withholding program funding is particularly acute in the Medicaid context, where massive budget overruns in state programs are almost a matter of course and states are politically 'locked-in' to [FFP]." Brian J. Dunne, Comment, *Enforcement of the Medicaid Act Under 42 USC § 1983 After* Gonzaga University v Doe*: The "Dispassionate Lens" Examined*, 74 U. CHI. L. REV. 991, 994–95 (2007); *cf. Arthur C. Logan Mem. Hosp.* v. *Toia*, 441 F. Supp. 26, 27 (S.D.N.Y. 1977) ("The Secretary can withhold payment or he can negotiate with a State. He cannot compel compliance.").

Further to that end, HHS itself has been quite candid about its unwillingness to pursue the more drastic legal remedies with which Congress has provided it:

> A compliance action, which results in the withholding of FFP, has a potentially detrimental effect on Medicaid recipients and providers. If HCFA were to withhold FFP pursuant to a compliance action, recipients may well be deprived of medical assistance because the State may no longer be able to provide certain services. Particularly where a pending [plan amendment] involves the expansion of Medicaid services, a compliance action can deprive recipients of those expanded services. Thus, before exercising its

> discretionary authority to initiate a formal compliance action against a State, HCFA carefully weighs the advantages and disadvantages.

Exeter Amicus Br., *supra*, at 13 n.11.

Also relevant is CMS's disinclination to initiate compliance actions *while* state plan amendments are pending. *See, e.g.*, *id.* at 11 ("HCFA does not generally initiate a compliance action against a State that implements a [plan amendment] prior to HCFA approval during the period that the agency is reviewing the [amendment], whether before or following a request for additional information."). Given the agency's limited litigation resources, it has long adhered to the "general rule" that it "does not generally expand the resources necessary to pursue a compliance action against a State where HCFA might ultimately approve the [plan amendment] at issue." *Id.* at 12.

Taken together with the extensive administrative and judicial review that findings of non-compliance and denials of plan amendments both typically precipitate,[11] the practical result is that there is almost always a substantial period of time during which HHS can take no administrative action to

---

11. After either a denial of a proposed plan amendment or an administrative finding of non-compliance, the state has a statutory right to a full administrative hearing, the final decision in which may in turn be reviewed by the relevant U.S. Court of Appeals pursuant to the Administrative Procedure Act. *See* 42 U.S.C. §§ 1316(a), 1396c. For exemplar cases, see *Iowa Dep't of Hum. Servs.* v. *CMS*, 576 F.3d 885 (8th Cir. 2009); *Md. Dep't of Health & Mental Hygiene* v. *CMS*, 542 F.3d 424 (4th Cir. 2008); *Minnesota* v. *CMS*, 495 F.3d 991 (8th Cir. 2007); and *La. Dep't of Health & Hosps.* v. *CMS*, 346 F.3d 571 (5th Cir. 2003).

remedy an ongoing violation of § 30(A). *See, e.g.*, Statement of Interest of the United States at 1–3, *Planned Parenthood of Ind., Inc.* v. *Comm'r of the Ind. State Dep't of Pub. Health*, No. 11-cv-630 (S.D. Ind. June 16, 2011) [hereinafter "*Planned Parenthood* Amicus Br."] (explaining why injunctive relief is both necessary and appropriate to prevent a state from continuing to violate the Medicaid Act until HHS has the opportunity formally to reject a plan amendment).

Not surprisingly, then, "HHS has long recognized that access issues are not easily resolved in formal or adjudicatory settings." Brief of Amicus Curiae Secretary of Health & Human Services at 12, *Clark* v. *Kizer*, 758 F. Supp. 572 (E.D. Cal. 1990) (No. 87-1700). Instead, "HHS regional officials have sought to monitor and promote access through informal processes, principally by raising the issue of the adequacy of rates in meetings and correspondence with state authorities." *Id.* The proposed new CMS rule reflects this approach, since it aims to create new means of promoting adherence to § 30(A) short of federal disapproval or compliance proceedings. *See* 76 FED. REG. at 26,345.

Finally, it bears noting that there is no realistic financial incentive for CMS aggressively to enforce § 30(A)—quite to the contrary. Because FFP is a function of the funds the state *actually* expends reimbursing providers, state non-compliance with § 30(A) necessarily results in lower reimbursement rates, thereby saving the federal government money. *See* Moncrieff, *Assault on Litigation*, *supra*, at 2341 ("In that framework, CMS is unlikely to enforce something like the Equal Access Provision, which would, in its violation, save federal money."). If

anything, because poorer states tend to have the highest percentage of their Medicaid outlays reimbursed by the federal government, the states under the greatest pressure to cut costs will be those in which the federal government spends (and stands comparatively to save) the highest proportion of funds.

e. Even in the Absence of Such Constraints, the "Cooperative Federalism" Behind Medicaid Means That the Executive Branch is Under Far More Political Pressure from States than From Beneficiaries or Providers

Aside from the specific logistical and practical hurdles that CMS would face if it sought aggressively to enforce the equal access mandate, political considerations also suggest that exclusive federal enforcement is unlikely to vindicate the Medicaid Act's access-oriented goal. Under the Medicaid Act, the only permissible way to reduce reimbursements across the board is to tighten eligibility requirements—a measure that itself requires the permission of the federal government. *See* 42 U.S.C. § 1315(a); Judith M. Rosenberg & David T. Zaring, Recent Development, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

As news reports suggest, Arizona and New Jersey have recently made such requests based on current economic conditions, and similar efforts from other states are likely in the offing. *See* Michael A. Fletcher, *GOP Governors Push Back Against Obama on Federal Medicaid Rules*, WASH. POST, June 15, 2011, at A1. And whatever else may be true about

the politically partisan nature of many of these bilateral state-federal negotiations, *see, e.g.*, *id.*, what cannot be gainsaid is that neither providers nor Medicaid beneficiaries have a seat at the table in these discussions, or any means of legally contesting arrangements that are reached therein.

Again, this reality is hardly specific to the Medicaid program. The intended beneficiaries of federal funds are usually underrepresented when it comes to federal-state interactions with regard to program administration. *See generally* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297 (1996). But given that Medicaid consumed nearly 22 percent of all state budgets (including FFP) in FY2010, and as much as 37 percent of some, *see* Fletcher, *supra*, there is every reason to believe that the political pressure the federal government receives from the states will be at its zenith in the Medicaid context, all the more so in light of the absence of comparable pressure to enforce zealously those statutory mandates that compel states (and the federal government) to spend *more* money.

* * *

On their own, none of the above points are unique to the equal access mandate—or to the Medicaid Act more generally. But taken together, they reinforce the general proposition that the federal government lacks the financial, legal, logistical, and political wherewithal comprehensively to enforce § 30(A) against the states. Thus, whereas the Department of Justice suggests that "Recognition of a nonstatutory cause of action for Medicaid providers and beneficiaries in this setting would be in tension with

the nature of the federal-state relationship and the enforcement scheme contemplated by the statute," Gov't Br., *supra*, at 25, the reality is that *exclusive* federal enforcement would be in far greater tension with the scheme Congress intended and HHS has historically supported and embraced, if for no other reason than that it would not—and probably cannot—produce meaningful compliance with the Medicaid Act's access mandate.

III. PRIVATE ENFORCEMENT OF § 30(A) DOES NOT MATERIALLY INTERFERE WITH THE SECRETARY'S DISCRETION

Separate from the contention that private enforcement would generally be inconsistent with the statutory scheme Congress intended to create in the Medicaid Act, the Justice Department's brief concludes by offering the related but distinct argument that private enforcement of § 30(A) would interfere with the Secretary's authority to administer the Medicaid Act, and, specifically, to approve or reject state plans and amendments thereto. *See, e.g.*, Gov't Br., *supra*, at 32 ("Recognition of a nonstatutory private right of action would mean that multiple federal courts across different jurisdictions would similarly (and perhaps simultaneously) be called on to decide such compliance questions."); *see also id.* ("[T]he proceedings would inevitably lead to the development and application of different legal standards.").

Even if this concern was well-founded (and, as explained below, it is not), the fact remains that private enforcement has been a prominent feature of the Medicaid Act in general, and the equal access provision in particular, since well before this Court's 2002 decision in *Gonzaga University* v. *Doe*, 536 U.S.

275. And in the nine years since *Gonzaga*, neither Congress nor HHS has taken any steps to alter the tandem enforcement structure that emerged during the first 37 years of the program. Thus, it is no surprise that, whatever other critiques such private enforcement may have engendered, the Justice Department can point to no prior instance in which interference with the agency's discretion was invoked to militate against private remedies.

a. The Federal Government Has Never Previously Opposed Private Enforcement of § 30(A) on the Ground That It Would Interfere With the Secretary's Authority

Although it has consistently been HHS's position that private enforcement serves an important role in vindicating the Medicaid Act's central goals, the same view was not always shared by the Justice Department—even prior to this litigation. In *Wilder*, for example, the government's brief as *amicus curiae* (which was not joined by any HHS officials) argued against allowing for private enforcement of the Boren Amendment via 42 U.S.C. § 1983, offering much of the same analysis concerning the nature of the statutory scheme that the *Wilder* Court ultimately rejected (and that the Justice Department's brief in this case largely reprises). *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Wilder*, 496 U.S. 498 (No. 88-2043).

Tellingly, though, the *Wilder* brief did not suggest that private enforcement of the Boren Amendment would interfere with the *Secretary*'s discretion. Instead, it argued that

> Congress did not intend to confer on Medicaid providers an "enforceable

> right" to challenge state reimbursement decisions in federal court. Lawsuits like respondent's interfere with *state* autonomy and discretion, and they contravene Congress's intent that the degree of federal oversight be minimized. There is no reason to believe that Congress wished the participating States to absorb the substantial costs entailed by such litigation.

Id. at 23 (emphasis added).

Indeed, testifying before the House Commerce Committee in 1996, Secretary Shalala specifically suggested that, rather than interfering with the agency, "[r]eview by federal courts . . . *promotes* efficiency," because it allows for those with principal responsibility for the content of federal law to control its application across multiple jurisdictions, especially "when Medicaid interacts, as is often the case, with other federal statutes (such as Medicare, Social Security, SSI and AFDC)." *NGA Agreement* Hearing, *supra* (statement of Hon. Donna E. Shalala) (emphasis added). These disparate examples reflect the same broader truth, *i.e.*, that the federal government has never previously argued against private enforcement of the Medicaid Act on the ground that such suits would interfere with the Secretary's discretion in administering the statute.

b. Unless Private Enforcement Yields an Unambiguous Construction of § 30(A), the Secretary Retains Discretion Over State Plans

The absence of prior examples, and the thrust of Secretary Shalala's testimony, may perhaps be attributed to the fact that it is difficult to understand

how private enforcement *could* meaningfully interfere with the Secretary's authority. In that regard, the Justice Department's analysis of the potential for interference if the decision below were affirmed appears to neglect settled principles of administrative law.

First, as a general matter, if § 30(A) is ever ambiguous as to what constitutes "equal access," *see, e.g.*, *Alaska Dep't of Health & Soc. Servs.* v. *CMS*, 424 F.3d 931, 935 (9th Cir. 2005), the Secretary's reasonable interpretation of that language will be entitled to *Chevron* deference, *see, e.g.*, *Pharm. Research & Mfrs. of Am.* v. *Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004) ("In the case of the Medicaid payment statute, the Congress expressly conferred on the Secretary authority to review and approve state Medicaid plans as a condition to disbursing federal Medicaid payments. . . . Congress [thereby] manifested its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law." (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001)); *see also West Virginia* v. *Thompson*, 475 F.3d 204, 212-13 (4th Cir. 2007) (holding that *Chevron* deference applies to CMS's interpretation of Medicaid Act provision in approval of state plan amendments); *Harris* v. *Olszewski*, 442 F.3d 456, 466–67 (6th Cir. 2006) (same); *S.D. ex rel. Dickson* v. *Hood*, 391 F.3d 581, 595–96 (5th Cir. 2004) (same). *See generally Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

Second, because the Secretary's reasonable interpretations of § 30(A) will generally receive *Chevron* deference, she is not bound by prior judicial decisions holding that particular state plan

amendments do or do not violate § 30(A) in cases in which the statute is held to be ambiguous. As this Court has explained, "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also id.* at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). Even if a case arose in which a court construed § 30(A) to be unambiguous, that would only prove the point, for the Secretary at that point would have *no* statutory discretion to approve or reject the state plan amendment there at issue. *See, e.g.*, *Ark. Med. Soc'y*, 6 F.3d at 526 n.5 ("[T]he operative effect of [§ 30(A)] is to underscore the mandatory nature of the state plan requirements by expressly prohibiting the Secretary's discretion to approve funds for state provisions that do not conform to federal law.").

Third, and related, a judicial decision upholding or invalidating a state plan amendment based upon an interpretation of ambiguous language within § 30(A) would not preclude the state from submitting either that amendment or a revised one to the Secretary for approval. *See, e.g.*, *New York* v. *Shalala*, 119 F.3d 175, 180–81 (2d Cir. 1997). Of course, such a possibility does not mean that private enforcement would be meaningless; the effect of the court's decision in such a case would be, critically, to

bar enforcement of the challenged amendment until and unless it is approved by the Secretary. *See, e.g.*, *Exeter* Amicus Br., *supra*, at 7–10 (setting forth as HCFA's position that states assume the risk of private litigation if they implement a plan or plan amendment prior to agency approval). So understood, it is difficult to see how private enforcement could jeopardize the Secretary's discretion before that discretion could even be exercised.

The upshot of these points is that private judicial enforcement of § 30(A) cannot meaningfully interfere with the Secretary's discretion to interpret § 30(A) in approving or rejecting state plan amendments. Where a state plan amendment satisfies or violates the plain text of § 30(A), the Secretary possesses no such discretion. And where the statute *is* ambiguous, the Secretary's reasonable interpretation of whether a state plan amendment complies with § 30(A) will necessarily override any prior judicial interpretation—and control any subsequent judicial consideration—of the same amendment. All that private enforcement adds is the ability (which may well be vital from the beneficiaries' perspective) to enjoin a violation of § 30(A) until and unless the Secretary has the opportunity to act.

c. Private Enforcement Provides a Means for Meaningful Statutory Enforcement Both Until and Unless the Secretary Has the Opportunity To Exercise Her Discretion—and to Ensure that the Secretary is Acting Within Her Discretion

Lest the above discussion suggest that private enforcement is but a temporary stop-gap to preserve the status quo until the agency has the chance

formally to approve or reject a state plan or plan amendment, private enforcement also fills the vital gap that the difficulties identified in Part II, *supra*, would otherwise create: As HHS explained in its amicus brief in the *Exeter* litigation, "even if HCFA decides, in the exercise of its discretion, not to bring a compliance action against a State for implementing a [plan amendment] prior to HCFA approval, . . . the State may still be subject to a suit for injunctive and declaratory relief . . . ." *Exeter* Amicus Br., *supra*, at 10; *see also Planned Parenthood* Amicus Br., *supra* (explaining why injunctive relief prior to HHS rejection of a state plan is both necessary and appropriate).

In other words, in addition to not interfering with the Secretary's discretion, private enforcement may even expand the Secretary's discretion by providing a means of ensuring state compliance with § 30(A) that is far less draconian than the administrative remedies directly available to the Secretary. This understanding has been the cornerstone of HHS policy throughout the history of the Medicaid Act, and the prevailing view of those charged with administering the program. Moreover, the Justice Department's present views to the contrary, such a view is completely consistent with the cause of action recognized by the Court of Appeals. *See Indep. Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert. granted sub nom. Maxwell-Jolly* v. *Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992 (2011).

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decisions below be affirmed.

Respectfully submitted,

STEPHEN I. VLADECK
Counsel of Record
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 274-4241
svladeck@wcl.american.edu

CHARLES S. SIMS
MATTHEW J. MORRIS
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
(212) 969-3600
csims@proskauer.com

Counsel for *Amici Curiae*

AUGUST 5, 2011

APPENDIX

List of *Amici Curiae* Former HHS Officials

JODIE Z. BERNSTEIN
General Counsel, HHS (1979–81)

HON. JOSEPH A. CALIFANO, JR.
Secretary, U.S. Department of Health, Education, and Welfare (1977–79)

PETER B. EDELMAN
Counselor to the Secretary, HHS (1993–95);
Assistant Secretary for Planning and Evaluation, HHS (1995–96)

JUDITH M. FEDER
Principal Deputy Assistant Secretary for Planning and Evaluation, HHS (1993–95)

NAN D. HUNTER
Deputy General Counsel, HHS (1993–96)

RENÉE M. LANDERS
Acting Deputy General Counsel, HHS (1996);
Deputy General Counsel, HHS (1996–1997)

KAREN POLLITZ
Deputy Assistant Secretary for Health Legislation, HHS (1993–97);
Director, Office of Consumer Support, Center for Consumer Information and Insurance Oversight, CMS (2010–11)

HARRIET S. RABB
General Counsel, HHS (1993–2001)

DAVID SATCHER, M.D., PH.D.
U.S. Surgeon General (1998–2002);
Assistant Secretary for Health (1998–2001)

HON. DONNA E. SHALALA
Secretary, HHS (1993–2001)

BRUCE C. VLADECK
Administrator, HCFA (1993–97)

TIMOTHY M. WESTMORELAND
Director of Center for Medicaid and State
Operations, HCFA (1999–2001)

RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, and 10-283

IN THE
Supreme Court of the United States

AUG 4 - 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,
Petitioner,
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation,

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,
Petitioner,
v.
CALIFORNIA PHARMACISTS ASSOCIATION, et al.,

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,
Petitioner,
v.
SANTA ROSA MEMORIAL HOSPITAL, et al.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PAUL M. SMITH
Counsel of Record
MATTHEW S. HELLMAN
CAROLINE D. LOPEZ
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

August 5, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Congress Has Relied On This Court's Long Tradition Of Allowing Private Suits For Equitable Relief Under The Supremacy Clause 5

II. That Section 30A's Obligations Arise Under The Spending Clause Makes Them More, Not Less, Suitable For Enforcement Under The Supremacy Clause 11

A. This Court Has Consistently Permitted Preemption Claims Seeking To Enforce Obligations Incurred Under The Spending Clause. 12

B. A Remedy Under The Supremacy Clause Is Particularly Useful In Spending Clause Cases 13

C. Congress Intends The Ultimate Beneficiaries Of Spending Clause Funds To Be Able To Obtain Equitable Relief When A State Fails To Comply With Its Obligations. 16

III. The History of Section 30A Demonstrates With Particular Clarity That Congress Did Not Intend To Foreclose Actions Under The Supremacy Clause..... 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 9

Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006) 12

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) 9

Blum v. Bacon, 457 U.S. 132 (1982) 12

California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 9

City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898) 6

Cort v. Ash, 422 U.S. 66 (1975) 8

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 6, 9

Dalton v. Little Rock Family Planning Services, 516 U.S. 474 (1996) 12

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 9

Edelman v. Jordan, 415 U.S. 651 (1974) 10

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 6

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 9

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 9

Helvering v. Davis, 301 U.S. 619 (1937) 2

Itel Containers International Corp. v. Huddleston, 507 U.S. 60 (1993) 9

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 9

Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256 (1985) 12

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 9

Malone v. White Motor Corp., 435 U.S. 497 (1978) 9

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 9

Microsoft Corp. v. i4i Limited Partnership, 131 S. Ct. 2238 (2011) 6

Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 489 U.S. 493 (1989) 9

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 9

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 6

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 19, 20

PhRMA v. Walsh, 538 U.S. 644 (2003) 4, 12

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 9

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 9

Rosado v. Wyman, 397 U.S. 397 (1970) 13, 14

Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003) 5

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 6

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 5

State v. Wilson, 11 U.S. (7 Cranch) 164 (1812) 6

United States v. County of Fresno, 429 U.S. 452 (1977) 9

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 10

Wilder v. Virginia Hospital Ass'n, 496 U. S. 498 (1990) 13, 21, 22

Ex parte Young, 209 U.S. 123 (1908) 9-10

STATUTES

6 U.S.C. § 134 8

29 U.S.C. § 1144(b)(2)(A) 8

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 22

Pub. L. No. 105-33, § 4711(a), 111 Stat. 251 22

LEGISLATIVE MATERIALS

H.R. 2491, 104th Cong. (1995) 22

H.R. REP. NO. 105-149 (1997) 23

Governors' Perspective on Medicaid, Hearing Before the Senate Committee on Finance, 105th Cong. (1997) 23

Medicaid Reform: The Governors' View, Hearing Before Subcommittee on Health and Environment of the House Committee on Energy & Commerce, 105th Cong. (1997) 23

S. 1956, 104th Cong. (1996) 22

OTHER AUTHORITIES

Brief for the United States as *Amicus Curiae, California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971) (No. 70-507), 1971 WL 147066 8

Brief for the United States as *Amicus Curiae, California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997) (No. 95-789), 1996 WL 340772 7

Brief for the United States as *Amicus Curiae, Carleson v. Remillard*, 406 U.S. 598 (1972) (No. 70-250), 1971 WL 1333367 7

Brief for the United States as *Amicus Curiae, Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 194805 7

Brief for the United States as *Amicus Curiae, District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (No. 91-1326), 1992 WL 12012049 7

Ann Devroy & Eric Pianin, *Clinton Vetoes GOP's 7-year Balanced Budget Plan*, WASH. POST, Dec. 7, 1995, at A1 22

Jennifer Suttle, Cong. Research Serv., CRS Report for Congress: *Balanced Budget Act of 1995: A Legislative History and Brief Summary of H.R. 2491* (1996) 22

INTEREST OF *AMICI CURIAE*

Amici, Representative Henry A. Waxman, Senator Max Baucus, House Minority Leader Nancy Pelosi, Senate Majority Leader Harry Reid, Representative George Miller, Senator Tom Harkin, and Representative Sander M. Levin, are a group of current Members of Congress who support private rights of action for equitable relief in this context.[1] The personal experiences of *amici*, as Members of Congress who have worked extensively on legislation and oversight of Federal health programs, including those authorized under Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, provide insight into Congress' intent to preserve prospective relief to vindicate the supremacy of the Medicaid Act over contrary state legislation. *Amici* are uniquely situated to do so.

Amici support the argument of Respondents that Congress intended to preserve the private cause of action for equitable relief to vindicate the supremacy of Medicaid conditions over contrary state action. *Amici* explain that Congress relied on this Court's longstanding practice of hearing these causes of action, except where statutes expressly barred them. In contrast, the approach suggested by California and the Solicitor General would upend centuries of settled understanding and would undermine the

---

[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letter of consent have been filed with the clerk.

effectiveness of Medicaid. *Amici* believe that such suits are critical here to protect the intended beneficiaries of Medicaid – the Medicaid recipients. Allowing for prospective relief in this narrow context supplements the agency's limited enforcement resources, and can be a more effective measure than using administrative means to cut off federal funding to the program. Because Section 30A is no different than any of the dozens of other Congressional enactments that this Court has allowed to be enforced through the Supremacy Clause, the judgment below should be affirmed.

SUMMARY OF ARGUMENT

Nearly 75 years ago Justice Cardozo set forth the basic principle that when "[federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." *Helvering v. Davis*, 301 U.S. 619, 645 (1937). This case implicates not only that venerable principle, but one of even older vintage: the right to seek equitable relief under the Supremacy Clause against state law that is inconsistent with Congressional enactments.

In the posture this case comes to the Court, it is undisputed that California has not complied with its obligations to fund the Medicaid program that Congress enacted and that California agreed to administer. It is equally undisputed that for nearly 200 years, this Court has heard claims under the Supremacy Clause seeking prospective relief based on preemption of inconsistent state law without ever

requiring an express cause of action from Congress to do so.

Now California, joined by the Solicitor General, asks this Court to hold for the first time that Section 30A is not enforceable in a private suit seeking equitable relief. This Court should reject that position for four reasons.

First, Congress has relied on this Court's unbroken practice of permitting suits for equitable relief under the Supremacy Clause. Congress is fully capable of stating when it does not want to allow a private cause of action. And it is fully capable of stating when it does not want an enactment to be construed as displacing state law. But when Congress does not so state, it has long understood that an action for equitable relief will be available to individuals harmed by state law that is inconsistent with federal law. California's broad argument that such relief is available only when Congress has provided an express cause of action is irreconcilable with the many cases from this Court allowing such relief without ever requiring the plaintiff to identify a right of action. And it is also irreconcilable with this Court's practice of presuming that equitable relief is available under *Ex parte Young* unless Congress affirmatively indicates otherwise. *See infra* Part I.

Second, the efforts of California and the Solicitor General to distinguish Section 30A on the ground that it imposes obligations under the Spending Clause are unavailing. This Court has routinely allowed Supremacy Clause actions to enforce

obligations incurred under the Spending Clause. Indeed, this Court not long ago affirmed the availability of that very relief in a case in which the plaintiffs argued that state regulation was preempted by Medicaid. *See PhRMA v. Walsh*, 538 U.S. 644, 662-74 (2003). But more than that, the Spending Clause context provides greater reason, not less, to allow preemption actions. California and the Solicitor General assert that the proper remedy here is for the United States to cut off funding to a state that does not comply with its Medicaid obligations. But that would only dramatically exacerbate the problems of Medicaid recipients in California. In contrast, allowing private attorneys general to supplement the agency's enforcement powers provides a remedy that is consistent with Congress's goals and vindicates the supremacy of federal law. *See infra* Part II.A &B.

Third, California and the Solicitor General are wrong when they contend that a preemption claim is improper here because Respondents are seeking a benefit rather than invoking an immunity. When a state receives federal funds, Congress is equally concerned that a state comply with *all* the conditions attached to those funds, whether they be a limitation on how a state may regulate, or an obligation to provide a certain standard of benefits. *See infra* Part II.C.

Fourth, the argument that there is no right to enforce Section 30A under the Supremacy Clause is particularly weak because Congress has repeatedly debated whether to eliminate Section 30A and/or bar private rights of action, and it has consistently

refused to do so, even as it has eliminated other rights-giving provisions in Medicaid. *See infra* Part III. Congress has expressly chosen to maintain Section 30A knowing full well that it provides enforceable rights. This Court should not override that decision, particularly when doing so would require overturning two centuries of case law.

ARGUMENT

I. CONGRESS HAS RELIED ON THIS COURT'S LONG TRADITION OF ALLOWING PRIVATE SUITS FOR EQUITABLE RELIEF UNDER THE SUPREMACY CLAUSE.

When Congress legislates, it does so with an understanding of the legal principles that will govern the interpretation of what it enacts. *Amici* can attest to the truth of that statement based on their extensive legislative experience. And it is correct as well as a matter of law under this Court's well-settled doctrines. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("We assume that Congress is aware of existing law when it passes legislation.") (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, (1990)). For example, when Congress uses terms drawn from the common law, this Court understands that usage indicates Congress's intent to incorporate the terms' common law gloss. *E.g. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003). Likewise, when Congress chooses *not* to amend a statute in the face of a judicial construction, it can be presumed to have acceded to the interpretation this Court articulated.

E.g., *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011).

The question in this case is whether Congress intended to allow suits under the Supremacy Clause to remedy state law inconsistent with the obligations imposed by Section 30A of the Medicaid Act. And for 200 years this Court's decisions have indicated that such relief is available to vindicate the supremacy of federal law in the absence of an express provision to the contrary. The line of authority establishing this proposition encompasses some of this Court's most seminal cases, both longstanding and of more recent vintage, concerning the preeminence of federal authority. *See, e.g.*, *State v. Wilson*, 11 U.S. (7 Cranch) 164, 166 (1812) (suit initially brought in state court challenging state tax as unconstitutional under Contracts Clause); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (suit to enjoin state tax as unconstitutional under Congress's Article I power to constitute Bank of United States); *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898) (finding tax unconstitutional after considering only whether the Court had jurisdiction); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (exercising jurisdiction over private party claim that California statute was preempted by federal regulation); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (enjoining state law preempted by ERISA); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (enjoining state law restricting purchases from Burma on preemption grounds).

Congress's understanding that equitable relief is available under the Supremacy Clause has been bolstered by the consistent (until now) position taken by the Executive Branch on this issue. Although the Solicitor General now contends that it is unclear "if ... a private party can bring a federal nonstatutory cause of action for equitable relief ... on preemption grounds," SG Br. at 16, the Executive has routinely appeared in such cases in favor of federal preemption, seeking the benefit of these private suits to vindicate the supremacy of federal law. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 194805; Brief for the United States as Amicus Curiae, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) (No. 91-1326), 1992 WL 12012049 (filing on behalf of private plaintiffs seeking declaratory judgment that state law is preempted by ERISA).

Indeed, even when the Solicitor General has argued that the state law was not preempted by federal law – thus arguing against private plaintiffs' interest – the Executive never suggested the plaintiffs' lack of a cause of action. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (No. 95-789), 1996 WL 340772 (arguing against federal preemption where plaintiffs sought declaratory judgment that ERISA preempted state enforcement action, but failing to raise cause of action question); Brief for the United States as *Amicus Curiae*, *Carleson v. Remillard*, 406 U.S. 598 (1971) (No. 70-250), 1971 WL 133367

(opposing private plaintiffs on Social Security Act preemption of state welfare regulation, but not addressing cause of action); Brief for the United States as *Amicus Curiae*, *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121 (1971) (No. 70-507), 1971 WL 147066 (same).

Put simply, Congress is fully capable of saying when it does *not* wish to provide a cause of action to individuals. *See, e.g.*, 6 U.S.C. § 134 ("Nothing in this part may be construed to create a private right of action . . . ."). Congress is also fully capable of stating when federal law is *not* intended to preempt state regulation. *See, e.g.*, 29 U.S.C. § 1144(b)(2)(A) ("[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ."). But when Congress imposes obligations that do not contain limiting language of that sort, it relies on this Court's venerable practice of permitting suits to enjoin state laws that are preempted by federal law.

Against this background, it is thus remarkable that California's lead argument is that Section 30A's absence of an express right of action signifies that Congress "intended" to foreclose relief under the Supremacy Clause. Pet'r Br. 20-33. This Court has *never* required an express cause of action in its Supremacy Clause cases. To the contrary, this Court has remained steadfastly open to suits for purely prospective relief as a critical but limited safeguard, even while becoming more guarded against suits that seek monetary relief. For example, since this Court held in *Cort v. Ash*, 422 U.S. 66 (1975), that it would apply a more stringent test for implying rights of

action in federal statutes, there have been no fewer than nine cases in which this Court has upheld injunctive relief under the Supremacy Clause.[2] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983); *Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (even where Section 1983 relief is unavailable, "plaintiffs may vindicate [their] pre-emption claims by seeking declaratory and equitable relief in federal district courts through their powers under federal jurisdictional statutes") (Kennedy, J., dissenting).

Instead, a comparison to the *Ex parte Young* doctrine is highly pertinent. *See Ex parte Young*,

---

[2] During that period there were also at least seven such cases in which this Court found that injunctive relief was unwarranted. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *Ohio Bureau of Empl. Servs. v. Hodory*, 431 U.S. 471 (1977); *United States v. County of Fresno*, 429 U.S. 452 (1977). In not one of those cases did the Court express doubt about the existence of a cause of action in the first place.

209 U.S. 123 (1908). Far from requiring an express authorization to pursue injunctive relief under *Ex parte Young*, this Court *presumes* that Congress intends such relief to be available absent a clear indication by Congress to the contrary. *E.g., Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002) (allowing plaintiff to pursue relief under *Ex parte Young* because statute did not "display any intent to foreclose" that relief).

California and the Solicitor General apparently recognize this anomaly, and indeed the Solicitor General concedes in a footnote late in its brief that it "is not suggesting that Congress has 'displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*.'" SG Br. 32 n.12 (quoting *Verizon*, 535 U.S. at 647) (internal quotation marks omitted). Despite this concession, the Solicitor General appears to contend *Ex parte Young* is not relevant here because "[s]ome have described *Young*" as permitting only a "defens[ive]" action to prevent a state from bringing its own punitive action against the *Young* plaintiff. SG Br. at 19. *Accord* Pet'r Br. at 41. But *Ex parte Young* is not so limited. Such suits may be brought to compel state action required by federal law, and not just to enjoin punitive action. In the highly analogous case of *Edelman v. Jordan*, for example, this Court explained that *Ex parte Young* could be used to compel state officials to comply with the federal time limits for processing and paying applicants for a federal-state aid program on a prospective basis. 415 U.S. 651, 655-56, 664-66 & n.11 (1974). The availability of injunctive relief

was presumed there, even though the Court made no mention of any private right of action. The same result should hold here.

Accordingly, because this Court has never required an express cause of action to seek preemption under the Supremacy Clause, and indeed has consistently presumed that such relief would always be available under *Ex parte Young*, this Court should not disrupt Congress's expectations by ruling that Section 30A does not permit private enforcement under Supremacy Clause just because Congress did not provide an express right of action to do so.

II. THAT SECTION 30A'S OBLIGATIONS ARISE UNDER THE SPENDING CLAUSE MAKES THEM MORE, NOT LESS, SUITABLE FOR ENFORCEMENT UNDER THE SUPREMACY CLAUSE.

California and the Solicitor General contend that because Section 30A's obligations arise under Congress's Spending Clause authority they are inappropriate for enforcement through the Supremacy Clause. From *amici*'s perspective, that conclusion does not follow. When a state or local entity agrees to accept federal funds, it is obligated to use those funds in the manner required by Congress and to comply with any and all conditions put on the funds. As we explain, allowing such suits both comports with this Court's past practice and with common sense.

A. This Court Has Consistently Permitted Preemption Claims Seeking To Enforce Obligations Incurred Under The Spending Clause.

At the outset, it is important to recognize that notwithstanding the assertions of California and the Solicitor General, this Court has never treated Spending Clause obligations differently in allowing claims to proceed under the Supremacy Clause. When Congress exercises its Spending Clause powers, inconsistent state law must give way under the Supremacy Clause, just as it must to any other enactment of Congress. *See, e.g.*, *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985) (holding that the Payment in Lieu of Taxes Act preempted state rules mandating how local governments used the moneys); *Blum v. Bacon*, 457 U.S. 132, 138 (1982) (holding that federal regulations pursuant to the Emergency Assistance Program, which is federally funded under the Social Security Act, preempted state provisions regarding emergency assistance).

Indeed, this Court has heard numerous preemption challenges to state law under Medicaid itself. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 279-80 (2006) (holding that Medicaid preempted state laws regarding liens on settlement agreements); *PhRMA*, 538 U.S. at 662-74 (examining whether a preliminary injunction was appropriate where state action was allegedly preempted by Medicaid); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475 (1996) (per curiam) (discussing proper scope of injunctive

relief while declining to grant certification on the question whether the Hyde Amendment preempted contrary state laws).

B. A Remedy Under The Supremacy Clause Is Particularly Useful In Spending Clause Cases.

Despite the many cases allowing Spending Clause challenges, California and the Solicitor General argue that the only proper remedy is for the federal government to withhold funds from states that fail to comply with relevant federal law. Having reserved to the federal government the remedy of cutting off Medicaid funds (the argument goes), Congress must not have intended that the ultimate beneficiaries of those funds be able to sue when states take action inconsistent with federal law.

That argument turns the purpose of Medicaid on its head. Medicaid is a federal program "through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U. S. 498, 502 (1990). Withholding federal funding would make it even less likely that those "needy individuals" would receive the medical care a state agreed to provide.

This Court considered a similar situation in *Rosado v. Wyman*, where it heard a lawsuit by individuals who received benefit payments from New York as part of Congress's Federal Aid To Families with Dependent Children program. 397 U.S. 397 (1970). The petitioner claimed that New York's method of distributing the benefits violated the terms on which the federal government provided the

funds to New York. *Id.* at 399. In holding that the petitioner had a right to proceed (and prevail), Justice Harlan wrote for the Court:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. *We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.*

Id. at 420 (emphasis added).

So too here. Far from being unnecessary in Spending Clause cases, allowing for private attorneys general in this context is particularly useful to Congress. As the Solicitor General recognized in opposing certiorari in this case, "[a] system that relies solely on agency review may often be less effective in ensuring the supremacy of federal law than a system of agency review supplemented by private enforcement." SG Cert. Br. 19. Allowing for private enforcement provides a middle ground between doing nothing and cutting off funding. *See id.* (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 705 (1979)). It assists executive agencies that may lack the resources to enforce in every individual case the obligations Congress imposes. It offers an alternate

avenue of relief to the months and even years of delay between when a state implements cuts and when the agency completes its review.[3] It provides some assurance that Congress's objectives will be realized even during administrations that may have different enforcement priorities. And in this case in particular, it provides impoverished Medicaid patients and the medical providers who serve them a means of redress in the court system that they would often not have in the political battles over budget cuts.

Put another way, there is no reason to think that Congress would have limited enforcement of Medicaid obligations to a remedy that would terminate those obligations. California has been accepting more than $20 billion in federal Medicaid funds per year in exchange for its promise, among other things, to ensure that needy patients had access to health care. Congress authorized the expenditure of those funds because it found that they would serve important public interests. That California has failed to adhere to its obligations is a

---

[3] The delays in this case illustrate the problem. California waited until three months after it began cutting funds to submit its proposal to HHS. 09-958 Intervenor Resp. Br. 6. Two months after this submission, HHS requested that California submit additional information within 90 days. *Id.* The Secretary finally disapproved the plan twenty months after California failed to provide a response. *Id.* Currently, California is seeking reconsideration of this decision. *Id.* at 7. During this lengthy process, California has continued to implement the cuts except to the extent that it has been enjoined from doing so by the federal courts. *Id.*

reason to compel it do so, not a reason to abandon those interests by cutting off the program.

C. Congress Intends The Ultimate Beneficiaries Of Spending Clause Funds To Be Able To Obtain Equitable Relief When A State Fails To Comply With Its Obligations.

California and the Solicitor General also offer a cluster of arguments based on the fact that Respondents are not directly regulated by Section 30A, and instead receive their benefits from the state. Pet'r Br. at 46-48; SG Br. 16-24. These arguments are offered in an apparent attempt to distinguish this case from the many others allowing relief under the Supremacy Clause, but they have no bearing on what Congress should be presumed to have intended.

The Solicitor General, for example, emphasizes that Section 30A does not regulate respondents' "primary conduct," and that respondents are seeking a benefit promised by federal law rather than an "immunity" from state regulation. SG Br. at 22. California goes even further and contends that "[p]rinciples of supremacy, and of preemption generally, have no application to allegations that a state has failed to satisfy a federal funding condition." Pet'r Br. at 46.

But legislation, including Spending Clause legislation, may bestow benefits or provide immunities, and in both cases Congress intends that

those provisions be followed.[4] A state is no more free to withhold a benefit it agreed to bestow as a condition of taking a grant of federal funds than it is to violate the restrictive conditions attached to those funds.

This Court's recent decision in *PhRMA v. Walsh* is instructive. In *PhRMA*, a drug company trade association sought injunctive relief against a state that had imposed certain requirements on drug companies. The trade association argued that the state's program was inconsistent with the obligations it undertook as a condition of receiving Medicaid funds, and therefore preempted by federal law. The Solicitor General filed an amicus brief in favor of preemption, and only two members of the Court expressed any doubt that a private cause of action was permissible in that context.

California does not mention the *PhRMA* case even though it was central to the reasoning of the Court of Appeals. 10-283 Pet. App. 77-83. The Solicitor General acknowledges that *PhRMA* "could

---

[4] For example, California simply does not address and the Solicitor General has great difficulty in explaining how this distinction works in light of this Court's decision in *Crosby*. *See* SG Br. 23 n.8. In attempting to classify *Crosby* as involving a "defense," the Solicitor General construes the deprivation of a benefit in that case– eligibility to be awarded a state contract – as a burden – the "exercise of the State's authority to impose and enforce what were essentially state regulatory standards." *Id.* But that simply collapses the purported distinction between denying benefits and imposing burdens, and demonstrates that the distinction cannot separate permissible Supremacy Clause claims from impermissible ones.

arguably be described as similar" to this case, but contends that it is distinguishable because "[t]he question in *PhRMA* was not whether the State had complied with obligations imposed on it as a condition of receiving federal Medicaid funds, but whether the State's use of Medicaid authority as a tool to impose [restrictions] on drug manufacturers ... was consistent with the Medicaid statute." SG Br. at 22, 24. But again, there is no reason to think that Congress would be more inclined to allow a state to fail to comply with "obligations imposed on it as a condition of receiving federal funds" than it would to allow a state to impose restrictions inconsistent with those obligations.

California and the Solicitor General also advert to contract analogies and contend that because the states are the direct recipients of the federal funds, the respondents in this case are reduced to third-party beneficiaries who have no right to sue to enforce compliance with the "contract." SG Br. at 25-26.

Amici respectfully disagree with this characterization. To be sure, the states are critical partners in providing care under Medicaid. But they are not the intended beneficiaries of Medicaid. Medicaid's purpose is to ensure that poor people also have access to basic medical care by guaranteeing payment to medical providers for serving this vulnerable population. And when a state fails to live up to its responsibilities to these beneficiaries, Congress intended to preserve the private cause of action for injunctive relief under the Supremacy

Clause as a limited but critical safeguard for these beneficiaries.

This Court's decision in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), supports a cause of action along precisely these lines, contrary to California's and the Solicitor General's reading of the case. Pet'r Br. 18, 46-48; SG Br. 27. Although this Court determined that the federal statute at issue did not create substantive rights to monetary relief or "'appropriate' treatment in the 'least restrictive' environment," 451 U.S. at 11, 29, this Court left open the possibility of injunctive relief. The majority explained that they would not "significantly differ" from (dissenting) Justice White's proposed remedy if the district court were to find on remand that the state had failed to comply with "federally imposed conditions," *id.* at 30 n.23. In turn, Justice White's dissent made clear that the only distinctive aspect of private suits under Spending Clause statutes seeking to vindicate the Supremacy Clause is the *scope* of the appropriate injunctive relief. *Id.* at 53-54 (White, J., dissenting). Justice White explained that such injunctions "cannot survive the State's decision to terminate its participation in the program." *Id.* This distinction matches the scope of the remedy to the contours of the preemption in these cases, which stretches only as far as the state's acceptance of federal funding. It comes into play after a determination on the merits; it certainly does not serve as a threshold bar to suit.[5]

---

[5] To the extent the majority opinion can be read to limit the remedy to offering the State a choice between assuming the

Nor are California and the Solicitor General correct to argue that the "broad and non-specific" nature of the obligations imposed by Section 30A makes them inappropriate for an action seeking preemption. In the first place, this critique goes not to *whether* a cause of action exists in the first place, but to the *scope* of judicial relief available, This Court expressly limited the question presented in this case only to the first issue, and thus the second is not presented here.

Moreover, as the Solicitor General concedes, Section 30A's standards *are* enforceable in a judicial action where a State disagrees with the Secretary's disapproval of a State plan or amendment. *See* SG Br. at 31. If they are discernable in that context, it is difficult to see how they are unenforceable in the context of a private suit. Any remaining concerns about the need for agency input should be allayed by HHS's commitment "to conducting a rulemaking proceeding over the next year that will result in an authoritative interpretation of Section 1396a(a)(30)(A)." *See* SG Cert. Br. 8. As always, the agency's own interpretation will trump an inconsistent interpretation by a private party. *See id.* at 19 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

---

additional cost of compliance or not using federal funds, *see id.* at 29, that is a question as to the scope of the remedy, not the right to seek relief in the first place. In any case, the majority's position is entirely consistent with the dissent's explanation that courts can only prospectively compel states to abide by federal conditions so long as the state continues to accept funding. *See id.* at 53-54 (White, J., dissenting).

III. THE HISTORY OF SECTION 30A DEMONSTRATES WITH PARTICULAR CLARITY THAT CONGRESS DID NOT INTEND TO FORECLOSE ACTIONS UNDER THE SUPREMACY CLAUSE.

That Petitioner and the Solicitor General would argue that Section 30A should be the first statutory provision ever to be found *not* to allow an action under the Supremacy Clause is particularly odd because the history of that provision demonstrates that Congress consciously chose not to limit its means of enforcement.

Section 30A in its current form dates back to 1989, and in the last 15 years it has been the subject of repeated, but unsuccessful, efforts in Congress to restrict private rights of action. These efforts stemmed from an earlier decision by this Court, *Wilder*, 496 U.S. at 509-10, which held that language similar to Section 30A, known as the "Boren Amendment" was enforceable under Section 1983.[6]

---

[6] The Boren Amendment provided that

> a State plan for medical assistance must ... provide ... for payment ... of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standard developed by the State ...) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable

Congress responded to this holding by considering whether to bar *all* private actions to enforce a state's payment rates under Medicaid, including those under Section 30A. For example, in 1995, the President vetoed Congress' attempt to prohibit any "cause of action" to enforce a state's payment rates under Medicaid, H.R. 2491, 104th Cong. § 7002(b)(4) (1995).[7] Congress did not attempt to override this veto. *See* Jennifer Suttle, Cong. Research Serv., CRS Report for Congress: Balanced Budget Act of 1995: A Legislative History and Brief Summary of H.R. 2491 CRS-8 (1996). In 1996, the Senate initially attempted to bar private suits again, but Congress ultimately enacted a statute without any such provision. *Compare* S. 1956, 104th Cong. § 1508 (1996) *and* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

Congress ultimately repealed the Boren Amendment in 1997, Pub. L. No. 105-33, § 4711(a), 111 Stat. 251, but it did *not* repeal Section 30A, nor did it add language restricting causes of action. This was no oversight. At the same hearing in which

---

> State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality.

496 U.S. at 502-03 (emphasis added) (ellipses in original) (quoting 42 U.S.C. § 1396a(a)(13)(A) (1990)).

[7] President Clinton vetoed H.R. 2491 on December 6, 1995. Ann Devroy & Eric Pianin, *Clinton Vetoes GOP's 7-year Balanced Budget Plan*, WASH. POST, Dec. 7, 1995, at A1.

Congress heard criticism of the Boren Amendment, some witnesses also criticized litigation under Section 30A, which they deemed a "Boren-like" provision, s*ee Medicaid Reform: The Governors' View, Hearing of the H. Comm. on Commerce, Subcomm. on Health and Env't*, 105th Cong. 21 (1997) (prepared statement of Govs. Bob Miller and Michael O. Leavitt); *Governors' Perspective on Medicaid, Hearing Before the S. Comm. on Fin.*, 105th Cong. 37 (1997) (prepared statement of Govs. Bob Miller and Michael O. Leavitt).

California emphasizes that the accompanying report of the House Committee on the Budget stated that "[i]t is the Committee's intention that, following enactment of this Act, neither this nor any other provision of Section 1902 [the section containing Section 30A] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive." H.R. REP. NO. 105-149, at 591 (1997). But that report language does not track the actual text of the statute, which contains no prohibition of causes of action, and does not repeal Section 30A. And of course, it is the text of the statute that must prevail over a contrary passage of legislative history.

***

Congress remains free to amend the Medicaid statute to limit relief, shape relief, or to prohibit private causes of action altogether as Congress has done in other contexts when necessary. But there is nothing about Section 30A that makes it different from any of the other federal enactments that this

Court has permitted to be enforced under the Supremacy Clause. California agreed to provide a certain standard of benefits as a condition of receiving federal funds, and consistent with this Court's precedents, it is subject to equitable action if it fails to comply with those conditions.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
MATTHEW S. HELLMAN
CAROLINE D. LOPEZ
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

Attorneys for Amici Curiae

August 5, 2011

Supreme Court, U.S.
FILED
MAY 26 2011
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC.,
A NONPROFIT CORPORATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR OF THE
DEPARTMENT OF HEALTH CARE SERVICES,
STATE OF CALIFORNIA, PETITIONER
v.
SANTA ROSE MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* MICHIGAN AND 30 OTHER STATES SUPPORTING PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Raymond O. Howd
Division Chief

William R. Morris
Joshua S. Smith
Assistant Attorneys General
Health, Education, and
Family Services Division

Attorneys for Amici Curiae

Library of Congress
Law Library

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36104

John J. Burns
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

Thomas C. Horne
Attorney General
State of Arizona
1275 W. Washington
Phoenix, AZ 85007

Dustin McDaniel
Attorney General
State of Arkansas
323 Center St.
Ste. 1100
Little Rock, AR 72201

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

George Jepsen
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

Joseph R. Biden, III
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

David M. Louie
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Gregory F. Zoeller
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, Fifth Fl.
Indianapolis, IN 46204

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

William J. Schneider
Attorney General
State of Maine
Six State House Station
Augusta, ME 04333

Douglas F. Gansler
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

Jim Hood
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

Catherine Cortez Masto
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701

Roy Cooper
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105

John R. Kroger
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

William H. Ryan, Jr.
Acting Attorney General
State of Pennsylvania
Strawberry Square
16th Floor
Harrisburg, PA 17120

Peter Kilmartin
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14, Ste. 1
Pierre, SD 57501

Robert E. Cooper, Jr.
Attorney General
State of Tennessee
425 5th Ave. N.
Nashville, TN 37243

Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711

Mark L. Shurtleff
Attorney General
State of Utah
P.O. Box 142320
Salt Lake City, UT 84114

William H. Sorrell
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

Robert M. McKenna
Attorney General
State of Washington
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98501

Darrell V. McGraw, Jr.
Attorney General
State of West Virginia
1900 Kanawha Blvd., E.
Charleston, WV 25305

J.B. Van Hollen
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

Gregory A. Phillips
Attorney General
State of Wyoming
State Capitol Bldg.
Cheyenne, WY 82002

QUESTION PRESENTED

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) by asserting that the provision preempts a state law that may reduce payments to providers.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Only Congress has the power to create a private cause of action, and Congress declined to do so in § 1396a(a)(30)(A). 4

A. Under this Court's precedent, a plaintiff suing under a federal statute must show that Congress intended to create a private right of action to enforce that statute. 4

B. Congress did not intend to create a private right of action for alleged violations of § 1396a(a)(30)(A). 8

II. The Supremacy Clause should not be used to create a private right of action where Congress chose not to provide one. 10

III. Allowing "Supremacy Clause lawsuits" to enforce federal Medicaid laws will be a financial catastrophe for states. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Alexander v. *Sandoval*,
532 U.S. 275 (2001) 3, 4

Blessing v. *Freestone*,
520 U.S. 329 (1997) 6

Cal. v. *Sierra Club*,
451 U.S. 287 (1981) 5, 6

Cannon v. *Univ. of Chicago*,
441 U.S. 677 (1979) 5

Chapman v. *Houston Welfare Rights Org.*,
441 U.S. 600 (1979) 3, 10

Conboy v. *AT&T Corp.*,
241 F.3d 242 (2d Cir. 2001) 12

Cort v. *Ash*,
422 U.S. 66 (1975) 5

Equal Access for El Paso, Inc. v. *Hawkins*,
509 F.3d 697 (5th Cir. 2007) 8

Golden State Transit Corp. v. *City of Los Angeles*,
493 U.S. 103 (1989) 3, 10

Gonzaga Univ. v. *Doe*,
536 U.S. 273 (2002) 7

Horne v. *Flores*,
129 S. Ct. 2579 (2009) 13

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*,
501 U.S. 350 (1991) 4

Long Term Care Pharmacy Alliance v. *Ferguson*,
362 F.3d 50 (1st Cir. 2004) 8

Manday R. ex rel. Mr. & Mrs. R. v. *Owens*,
464 F.3d 1139 (10th Cir. 2006) 8

N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. *DeBuono*,
444 F.3d 147 (2d Cir. 2006) 8

New England Tel. & Tel. Co. v. *Public Utils. Comm'n*,
742 F.2d 1 (1st Cir. 1984) 12

Pa. Pharmacists Ass'n v. *Houstoun*,
283 F.3d 531 (3d Cir. 2002) 8

Pediatric Specialty Care, Inc. v. *Ark. Dep't of Human Servs.*,
443 F.3d 1005 (8th Cir. 2006) 8

Pennhurst State Sch. and Hosp. v. *Halderman*,
451 U.S. 1 (1981) 5, 6

Sanchez v. *Johnson*,
416 F.3d 1051 (9th Cir. 2005) 8

Suter v. *Artist M.*,
503 U.S. 347 (1992) 6

Verizon Md. Inc. v. *Public Serv. Comm'n*,
535 U.S. 635 (2002) 7

Westside Mothers v. *Olszewski*,
454 F.3d 532, (6th Cir. 2006) 8

Statutes

20 U.S.C. § 1703(f) 13
42 U.S.C. § 1396a(a)(30)(A) 1, 8, 9, 11
42 U.S.C. § 1983 ..... 7, 8, 9

Other Authorities

Montesquieu, *The Spirit of the Laws* 5
The Federalist No. 78, at 466 4

INTEREST OF *AMICI CURIAE*

The *amici* states administer jointly-funded federal-state programs, such as Medicaid, adoption assistance, and food assistance, in partnership with federal agencies. The financial impact of these programs on state budgets is astronomical. Take Medicaid, for instance. In fiscal year 2009, Michigan's total Medicaid spending exceeded $10.5 billion and consumed more than 18% of Michigan's general fund spending. The same year, California's total Medicaid spending exceeded $41.6 billion and consumed nearly 13% of California's general fund spending. And these costs are increasing far faster than inflation. In the midst of one of the country's worst economic crises in history, Medicaid spending nationwide rose from $338 billion in federal fiscal year 2007, to $359 billion in 2008, and to $387 billion in 2009.

Given the vast amounts of money at stake and the complexity of the Medicaid program, Congress has wisely delegated to the U.S. Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS) the authority to regulate this complex and highly technical subject matter, including provider-reimbursement rates. This litigation asks whether CMS will continue to be the arbiter of state Medicaid plans, or whether every discretionary decision states make in allocating Medicaid monies will instead be subject to enforcement by potentially millions of private litigants and court injunctions.

Here, the Ninth Circuit concluded that (1) there is no private right to enforce 42 U.S.C. § 1396a(a)(30)(A), but (2) the Supremacy Clause allows private litigants to sue anyway. Such a ruling, if affirmed, would invite

private litigants to sue the *amici* states not only over Medicaid-reimbursement decisions, but a whole host of other federal-state programs, contrary to Congress's intent. And the inevitable result of such lawsuits would be more court orders compelling the states to increase spending for the affected programs. Such judicial intervention destroys the delicate balance that Congress established between the states and federal agencies, creates significant risks to state budgets based on unpredictable court interpretations, and disrupts the smooth and efficient operation of federal-state programs.

The *amici* states respectfully request that the Court reverse the judgments below and affirm that it is inappropriate for the courts to allow private enforcement of a federal statute under the Supremacy Clause, when Congress has not clearly indicated in the statutory language its intent to create an individual right that a specific plaintiff may enforce.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the fundamental question of whether the Supremacy Clause can be used to privately enforce a federal statute after the courts have concluded that Congress did not intend private enforcement of that statute. Incredibly, the Ninth Circuit answered that question "yes." Pet. App. 83 ("a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs."). This Court should reverse for three reasons.

First, the Ninth Circuit's view usurps legislative authority. Only Congress has the power to create a private right of action to enforce a federal law. *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, when a statute does not display congressional intent to create both a private right and a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87.

Second, it is already well established by this Court's precedent that the Supremacy Clause, on its own, cannot create a cause of action when Congress has declined to do so. "[T]hat clause is not a source of any federal rights"; it "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). There is no compelling reason to overrule this well-settled precedent.

Third, the practical result of the Ninth Circuit's ruling is to transform private litigants into federal attorneys general of great destructive force, with the power to enforce their own interpretations of virtually any federal statute, regardless of whether Congress intended a private cause of action. Upholding the Ninth Circuit's decision would have a profound effect on principles of federalism and administrative deference, forcing the *amici* states to defend actions in circumstances where Congress chose to vest enforcement authority exclusively in an expert federal agency rather than private litigants. For all these

reasons, the *amici* states respectfully request that this Court reverse the Ninth Circuit and reaffirm that the Supremacy Clause does not provide private rights of action.

ARGUMENT

I. Only Congress has the power to create a private cause of action, and Congress declined to do so in § 1396a(a)(30)(A).

A. Under this Court's precedent, a plaintiff suing under a federal statute must show that Congress intended to create a private right of action to enforce that statute.

The question of whether a federal statute should be subject to private enforcement is a quintessential legislative judgment. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). If federal courts were allowed to ignore congressional commands and choose for themselves which federal requirements may be enforced by private litigants, they would assume the legislative role, substituting their own intent for that of Congress. See *id.* at 287 ("'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'") (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)); *The Federalist No.* 78, at 466 (Alexander Hamilton) ("'there is no liberty, if the power of judging be not separated from the legislative and executive

powers'") (quoting Montesquieu, *The Spirit of the Laws*).

This Court's precedent has honored the vital distinction between legislative and judicial power in considering when causes of action exist to enforce federal rights. Beginning with *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court articulated a multi-factor test for determining when a federal statute is privately enforceable, identifying congressional intent as one of the primary considerations for determining whether a private remedy is implicit in a statute. *Id.* at 78 ("is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?").

Only a few years later, in *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), the Court reiterated the primacy of congressional intent, noting that "the right- or duty-creating language of the statute has generally been the most accurate indicator" of the existence of a private right of action. *Id.* at 690 n.13. Then-Justice Rehnquist's concurring opinion emphasized the primacy of the statutory language, stating, "The question of the existence of a private right of action is basically one of statutory construction." *Id.* at 717 (Rehnquist, J., concurring).

Two years later, the Court affirmed those principles in a pair of opinions, *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1 (1981), and *Cal.* v. *Sierra Club*, 451 U.S. 287 (1981). In holding that 42 U.S.C. § 6010 does not create substantive rights, this Court in *Pennhurst* concluded that the statute was designed to share responsibility between the federal government and the states. *Id.* at 22. Accordingly,

"Congress must express clearly its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds," particularly where a state faces potentially "indeterminate" obligations. *Id.* at 24. This Court noted that the typical remedy for a state's noncompliance with Spending Clause legislation was termination of funds by the federal agency. *Id.* at 28. Since states can only determine their federal obligations by reference to Congress's clearly-expressed intent, it follows that the states should not be saddled with private lawsuits where the statute does not provide for them. *Id.*

In *Sierra Club*, this Court refused to recognize a private right of action under 33 U.S.C. § 403. 451 U.S. at 289–90. Relying on the four-part *Cort* test, this Court held that § 403 enacted a general ban on certain activities; it did not focus on a particular class of beneficiaries nor did it confer any rights on a particular group. *Id.* at 294. Federal courts "will not engraft a remedy on a statute . . . that Congress did not intend to provide." *Id.* at 297.

Decisions in the 1990s further reinforced this precedent. E.g., *Suter* v. *Artist M.*, 503 U.S. 347, 350 (1992) (careful examination of the Adoption Assistance and Child Welfare Act's language showed that "the Act does not create an enforceable right."); *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997) (no private right of action under Title IV-D of the Social Security Act; in making that determination, the Court must focus "on congressional intent.").

The case law culminated in *Alexander* v. *Sandoval*, discussed above, and *Gonzaga Univ.* v. *Doe*, in which

this Court articulated a strict, three-part test to determine whether Congress created an individual right that a specific plaintiff may enforce under 42 U.S.C. § 1983. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002). Under that test, a statute only gives rise to a private right of action where it contains express rights-creating language, speaks in terms of individuals rather than institutional policy, and private enforcement is not incompatible with the statutory scheme. Only where Congress has spoken "in clear and unambiguous terms" does a party have a private right of action to enforce a Spending Clause statute.[1] *Id.* at 290.

In sum, this Court's jurisprudence appropriately looks to congressional intent as expressed in the plain, statutory language to determine whether Congress created an individual right that a specific plaintiff may enforce. Separation-of-power principles could survive nothing less. This Court should reject the Ninth Circuit's approach, a regime that would render congressional intent irrelevant and wholly subservient to the self-serving statutory interpretations of private parties backed by court injunctions.

---

[1] See also *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 644 (2002), where this Court observed: "nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies." The courts thus look to *Congress* to identify whether a particular statute confers a private of action.

B. Congress did not intend to create a private right of action for alleged violations of § 1396a(a)(30)(A).

Seven of the eight Circuits that have addressed the question since this Court decided *Gonzaga* have concluded that Congress did *not* intend that Medicaid providers or beneficiaries would have the right to enforce § 1396a(a)(30)(A) in a § 1983 action. *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 56–59 (1st Cir. 2004) (not enforceable by providers); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc.* v. *DeBuono*, 444 F.3d 147 (2d Cir. 2006) (not enforceable by providers); *Pa. Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531, 541–42 (3d Cir. 2002) (not enforceable by providers) (Alito, J.); *Equal Access for El Paso, Inc.* v. *Hawkins*, 509 F.3d 697, 702–03 (5th Cir. 2007) (not enforceable by beneficiaries of services or providers); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 541–43 (6th Cir. 2006) (not enforceable by providers or recipients of services); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005) (not enforceable by providers or recipients of services); *Manday R. ex rel. Mr. & Mrs. R.* v. *Owens*, 464 F.3d 1139, 1146–48 (10th Cir. 2006) (not enforceable by providers or recipients of services); but see *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013–16 (8th Cir. 2006).[2] And while Congress has the power to respond to these rulings by changing the law to create private rights of action, it has steadfastly refused to do

---

[2] In *Minnesota Pharmacists Assoc.* v. *Pawlenty*, 690 F. Supp. 2d 809 (D. Minn. 2010), the court concluded that the Eighth Circuit's holding in *Pediatric Specialty Care*—that § 1396a(a)(30)(A) is privately enforceable—is inconsistent with this Court's decision in *Gonzaga*.

so, despite undertaking the broadest overhaul of healthcare regulation in the nation's history.

That congressional prerogative is well founded. When a state administers a public assistance program in conjunction with a federal agency, that agency should be the principal enforcer of the statute, regulations, and other directives. Each such federal agency has multiple tools to assure the state's compliance, the principal of which is its authority to withhold federal funds. Although Congress may intend that particular statutory provisions be subject to private enforcement through litigation, such lawsuits should be strictly limited to those based on provisions that unambiguously provide for private enforcement. 42 U.S.C. § 1396a(a)(30)(A) is not one of these provisions. Nor does the Supremacy Clause magically endow Medicaid providers and recipients with the authority to enforce this provision.

Instead, applying this Court's precedent, a private party can only secure judicial enforcement of provisions in which Congress has created an individual "right" that is enforceable by that party. Regardless of whether a plaintiff seeks to pursue his or her claim under the federal statute directly, § 1983, or any other potential vehicle, such enforcement should only be allowed to proceed consistent with congressional intent. Any other outcome would mean that important political questions are resolved outside the open debate of the democratic process. Such a debate at the time of § 1396a(a)(30)(A)'s enactment, for example, would have assuredly been robust had anyone suggested that Medicaid providers had a private right of action to enforce the provision.

II. The Supremacy Clause should not be used to create a private right of action where Congress chose not to provide one.

In *Golden State Transit Corp.* v. *City of Los Angeles*, this Court expressly rejected the Supremacy Clause as a source of any privately enforceable rights. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107–10 (1989). Specifically, the Court stated that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983." Rather, the Supremacy Clause merely "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Id.* at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)).

It would therefore "obviously be incorrect" to recognize a federal right of action whenever a federal statute or regulation preempts state law. *Golden State*, 493 U.S. at 108. A party may not invoke the Supremacy Clause to provide a rule of decision unless he or she is otherwise properly before the court. Accord, e.g., *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (noting that the Supremacy Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law").

The Court should not revisit its Supremacy Clause precedent. If the Supremacy Clause, on its own, created a stand-alone action based on preemption, then every provision in the United States Code would implicitly authorize a private cause of action against a state or local governmental defendant. As discussed in Section I, *supra*, such a concept would usurp

Congress's authority to say not only what the law is, but who has the right to enforce it.

Equally important, the Ninth Circuit's interpretation of the Supremacy Clause intrudes on executive branch authority. Here, as in many federal-state partnerships, Congress authorized an expert agency to interpret and enforce statutory requirements not only by promulgating regulations, but by approving state plans. E.g., 42 U.S.C. § 1396a(a) (to qualify for federal financial assistance, participating Medicaid states must submit to the Secretary, and the Secretary must approve, "a plan for medical assistance").[3]

Under the Ninth Circuit's reasoning, however, every person or entity with standing is a private attorney general, able to enforce federal statutes or regulations whenever someone believes a state is violating federal law. Allowing a Supremacy Clause action requires the federal courts to resolve questions that Congress thought best suited to resolution by federal agencies with technical knowledge and firsthand experience in the regulated area. Moreover, private litigation will inevitably produce inconsistent

---

[3] In other words, no state or state official violates federal law by administering a Medicaid program that fails to qualify for federal reimbursement. Nor do they violate federal law by provoking or daring the Secretary to withhold federal funds. It is impossible for state officials to "violate" the Medicaid Act. Only the Secretary can violate the Act—by approving federal reimbursement for a state program that fails to satisfy the criteria listed in 42 U.S.C. § 1396a. Accord *Pennhurst*, 451 U.S. at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

results in an area where Congress delegated enforcement authority to a federal agency to ensure uniformity. Cf. *Conboy* v. *AT&T Corp.*, 241 F.3d 242, 253 (2d Cir. 2001) ("[A] private right of action would place the [agency's] 'interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the [agency and] . . . would . . . deprive the [agency] of necessary flexibility and authority in creating, interpreting, and modifying . . . policy.'") (quoting *New England Tel. & Tel. Co.* v. *Public Utils. Comm'n*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.).

These considerations militate strongly in favor of maintaining the Court's precedent and the Framers' vision: the Supremacy Clause is a choice-of-law provision, not an affirmative grant of individual rights.

III. Allowing "Supremacy Clause lawsuits" to enforce federal Medicaid laws will be a financial catastrophe for states.

Principles of agency deference and separation of powers militate strongly against a regime whereby federal courts may thwart congressional will and create causes of action via the Supremacy Clause. But conditions on federal funding also implicate federalism, a concern heightened by the *amici* states' current fiscal crisis and the vast size of their Medicaid programs.

Only two years ago, this Court emphasized that federal courts should be cautious when dictating how states spend their limited funds:

> Federalism concerns are heightened when, as in these cases, a federal court decree has the

> effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs.

Horne v. *Flores*, 129 S. Ct. 2579, 2593–2596 (2009).[4]

The reality is that many states continue to experience severe budget shortfalls. In 2010-11, 43 states face budget shortfalls ranging up to 30% of their general fund budgets: "While states attempted to close their budget gaps through a variety of measures, including budget cuts, tax increases or taking money from rainy day funds, they face at least a combined $127 billion gap through fiscal 2012."[5]

Meanwhile, Medicaid budgets are growing rapidly: "During the worst economic downturn our nation has experienced since the great depression, national Medicaid spending rose from $338 billion in federal

---

[4] The Court cited the Equal Educational Opportunities Act, which requires states to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). 129 S. Ct. at 2588.

[5] Http://sunshinereview.org/index.php/State_budget_issues,_2010-2011# (as visited 3/29/11) ("In addition, the funds given to states also included large expansion of Medicaid to cover the health care of unemployed workers and single workers without children. In 2011, when the federal funds run out, states will be stuck with one million more people on Medicaid with no money to pay for it. The estimated increase from the temporary increase in the Federal Medicaid Assistance Percentage (FMAP) from ARRA is $87 billion over the 27 months which began October 2008 and ends December 2010. Medicaid enrollment increased by 6.0 percent during fiscal 2009.").

fiscal year 2007 to $359 billion in 2008 and to $387 billion in 2009. This represents increases of 6.4 percent and 7.7 percent respectively."[6] Faced with this financial tsunami, the *amici* states must make difficult choices regarding the programs they administer.

One of these critical choices involves the states' costs for maintaining their Medicaid programs, which increase because: (A) the costs of health care are rising nationwide;[7] and (B) the number of persons eligible for Medicaid is increasing. States may seek to reduce their Medicaid costs through several means, e.g., cuts in provider-reimbursement rates or the elimination of "optional" areas of Medicaid coverage. As a rule, if these proposed reductions are acceptable to the U.S. Department of Health & Human Services' Centers for Medicare & Medicaid Services (CMS), the states may implement them without judicial intervention.

But under the Ninth Circuit's approach, parties may obtain judicial court rulings, and obtain court injunctions, even before CMS has had a chance to review the state action at issue and provide its own interpretation. In the present cases, for example, California has been compelled to pay more than one billion dollars in additional Medicaid funds pursuant to

---

[6] http://www.kff.org/medicaid/upload/8152.pdf (as visited 3/29/11), at p. 1.

[7] In Michigan, "Federal Funds Information for States (FFIS) has estimated the gross cost of the Medicaid expansion in Michigan to be $1.8 billion by 2017 and $2.0 billion by 2019." Michigan State Fiscal Agency, "Fiscal Analysis of The Federal Health Reform Legislation," April 2010, http://www.senate.michigan.gov/sfa/Publications/Issues/HealthReform/FedHealthReformLegislation.pdf (as visited 3/29/11), at p. 5.

court interpretations of § 1396a(a)(30)(A) that the federal government has rejected. Such a regime creates immense budgetary uncertainty at a time when states can least afford it. And the Ninth Circuit's approach places the power of enforcement in the hands of millions of potential private parties rather than the federal agency that Congress chose to regulate the technical and complex Medicaid program. The courts should respect Congress's decision to leave Medicaid enforcement to CMS, and private enforcement of federal statutes should be limited to those where Congress has unambiguously created a private right of action.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

Raymond O. Howd
Division Chief

William R. Morris
Joshua S. Smith
Assistant Attorneys General
Health, Education & Family Services Division

Attorneys for *Amici Curiae*

Dated: MAY 2011

RECORD
AND
BRIEFS

Nos. 09-958, 09-1158, 10-283

In The Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR
CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
PETITIONER

v.

INDEPENDENT LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., ET AL.

AND

CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

AND

SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES SUPREME COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, NATIONAL ALLIANCE OF STATE PHARMACY ASSOCIATIONS AND THE AMERICAN PHARMACISTS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

ERIN M. DUFFY
DUANE MORRIS LLP
30 S. 17TH ST.
PHILADELPHIA, PA 19103
(215) 979-1000

DONALD L. BELL II
MARY ELLEN KLEIMAN
NATIONAL ASSOCIATION OF
CHAIN DRUG STORES
413 North Lee Street
P.O. Box 1417-D49
Alexandria, VA 22313
(703) 549-3001

FREDERICK R. BALL
Counsel of Record
NICHOLAS LYNN
DUANE MORRIS LLP
190 South LaSalle Street,
Suite 3700
Chicago, IL 60603
(312) 499-6720
FRBall@duanemorris.com

August 4, 2011

Counsel for Amici Curiae

Library of Congress
Law Library

QUESTION PRESENTED

Whether the Supremacy Clause supports an equitable cause of action under the Constitution, to prevent injury to Medicaid beneficiaries and providers, by enjoining state officials to refrain from implementing state legislation that contravenes 42 U.S.C. § 1396a(a)(30)(A) of the federal Medicaid Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Federal Constitution Is the Supreme Law of the Land 4

II. There Is a Cause of Action Under the Supremacy Clause of the Constitution 6

A. This Court Has Long Recognized a Cause of Action Under the Constitution. 6

B. Principles of Federalism Support a Cause of Action Under the Supremacy Clause 13

III. A Cause of Action Under the Supremacy Clause Is Particularly Important in Medicaid Cases 17

IV. This Court Has Distinguished Between Causes of Action Under the United States Constitution and Those Claims Brought Under 42 U.S.C. § 1983 20

V. Petitioners' Fiscal Arguments Are Not a Basis to Deny a Cause of Action Under the Supremacy Clause 22

VI. **This Court Should Not Treat Laws Enacted Pursuant to the Spending Clause Differently from Other Federal Laws** 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. Sandoval
532 U.S. 275 (2001) 20

Arkansas Dept. of Health & Human Servs. v. Ahlborn
547 U.S. 268 (2006) 12

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy
548 U.S. 291 (2006) 24

Bond v. United States
564 U.S. __, No. 09-1227, slip. op. (June 16, 2011) 14-16, 23

Cort v. *Ash*
422 U. S. 66 (1975) 8, 15, 20

Crosby v. Nat'l Foreign Trade Council
530 U.S. 363 (2000) 10

Davis v. Passman
442 U.S. 228 (1979) 6-7, 10, 15

Edelman v. Jordan
415 U.S. 651 (1974) 23

Ex parte Young
209 U.S. 123 (1908) 9, 23

Florida Lime & Avocado Growers, Inc. v. Paul
373 U.S. 132 (1963) 9

Foster v. Love
522 U.S. 67 (1997) 10

Hines v. Davidowitz
312 U.S. 52 (1941) 9

Jones v. Rath Packing Co.
430 U.S. 519 (1977) 9

Local Union No. 12004, United Steelworkers of Am. v. Massachusetts
377 F.3d 64 (1st Cir. 2004) 25

Lorillard Tobacco Co. v. Reilly
533 U.S. 525 (2001) 10

Louisville & Nashville R. Co. v. Mottley
211 U.S. 149 (1908) 9

Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan,
111 U.S. 379 (1884) 7

McCulloch v. *Maryland*
4 Wheat. 316 (1819) 8

Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co., 341 U. S. 246 (1951) 7-8

New York v. United States
505 U.S. 144 (1992) 14

Pennhurst State Sch. and Hosp. v. Halderman
451 U.S. 1 (1981) 23-24

Pharm. Research & Manuf. of Am. v. Walsh
538 U.S. 644 (2003) 12-13

Planned Parenthood of Houston & Southeast Texas v. Sanchez
403 F.3d 324 (5th Cir. 2005) 25

Pliva v. Mensing
564 U.S. __, No. 09-993, slip op. (June 23, 2011) 16, 24

Ray v. Atlantic Richfield Co.
435 U.S. 151 (1978) 9

Shaw v. Delta Air Lines, Inc.
463 U.S. 85 (1983) 9-10, 16

Smith v. Kansas City Title & Trust Co.
255 U.S. 180 (1921) 9

Steel Co. v. Citizens for Better Env't
523 U.S. 83 (1998) 11

Swiker v. Hogan
457 U.S. 569 (1982) 18

Trainor v. Hernandez,
431 U. S. 434 (1977) 7

United States v. Locke
529 U.S. 89 (2000) 10

Verizon Maryland., Inc. v. Pub. Serv. Comm'n. of Maryland
535 U.S. 635 (2002) 10-11, 21, 23

Warth v. Seldin,
422 U. S. 490 (1975) 7

Statutes and Constitutional Provisions

28 U.S.C. § 1331 ..... 9, 11

42 U.S.C. § 1396 *et seq.* 2

42 U.S.C. § 1396a 2

42 U.S.C. § 1396a(a)(30)(A) 2-3, 24

42 U.S.C. § 1983 ..... 4, 20-21

U.S. Const., art. VI, cl. 2 ..... *Passim*

Administrative Regulations

42 C.F.R. § 430.10 *et seq* 2

42 C.F.R. § 430.12(c) 19

76 Fed. Reg. 26342 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447) 3

Other Authorities

Assembly Bill 1183 (Cal. 2008) 17

Assembly Bill 5, 3d extraordinary sess. (Cal. 2008) 17

David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355 (2004) 12, 25

Finklestein et al., The Oregon Health Study Group, *The Oregon Health Insurance Experiment: Evidence from the First Year* (2011), *available at* http://www.nber.orgs.papers/w17190 18-19

Note, *Federal Jurisdiction Over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983 (1979) 9

The Federalist No. 33 (Alexander Hamilton) (Wilder Pub. 2008) 6

The Federalist No. 44 (James Madison) (Wilder Pub. 2008) 5

INTEREST OF *AMICI CURIAE*[1]

Amici—the National Association of Chain Drug Stores, the National Community Pharmacists Association, the National Alliance of State Pharmacy Associations, and the American Pharmacists Association—are national pharmacy and pharmacists associations whose members include national and community pharmacy providers who serve Medicaid beneficiaries.

In this case, the Court will decide whether the U.S. Court of Appeals for the Ninth Circuit correctly held that the Supremacy Clause provides a private right of action to third parties to challenge State laws preempted by federal law. The associations represent providers who participate in the Medicaid Program and who would be adversely impacted if the Court foreclosed their ability to challenge State action that is preempted by federal law, particularly as it relates to the Medicaid Program. For these reasons, *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. Other than *amici curiae*, their members, or their counsel, no party made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Medicaid is a joint federal and State program created under Title XIX of the Social Security Act to provide health care coverage to indigent and otherwise disadvantaged Americans in States that voluntarily elect to participate. 42 U.S.C. § 1396 *et seq.* Federal and State government agencies share responsibility for funding Medicaid. *Id.* § 1396a(a). Each State administers its own Medicaid program in accordance with federal and State law and pursuant to a Medicaid State Plan which the United States Department of Health and Human Services Centers for Medicare and Medicaid Services ("CMS") reviews and approves. 42 C.F.R. § 430.10 *et seq.* States participating in the Medicaid program may provide coverage for pharmacy services. 42 U.S.C. § 1396a. All fifty States have chosen to do so.

In order to comply with federal law, a State which chooses to participate in the Medicaid program must comply with the "quality of care" clause of 42 U.S.C.§ 1396a(a)(30)(A), which provides in pertinent part:

> A state plan for medical assistance must— . . . provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary. . . to assure that payments are consistent with efficiency, economy, and quality of care . . . .

42 U.S.C. § 1396a(a)(30)(A) ("Section 30(A)").

A State Medicaid program must also comply with the "access" clause of Section 30(A), which provides in pertinent part:

> A state plan for medical assistance must— . . . provide such methods and procedures relating to the . . . payment for, care and services available under the plan . . . as may be necessary. . . to assure that payments . . . are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

Id.

When States change how they set rates for Medicaid reimbursement to reduce the costs of their Medicaid programs, they frequently reduce payment rates to providers of medical services to Medicaid enrollees. Although Medicaid beneficiaries suffer the greatest injuries when States reduce payment for services because they lose access to needed care, providers are often the first to suffer the associated financial consequences. These reductions, when made without any analysis of their corresponding impact on providers and beneficiaries, run afoul of Section 30(A). *See* Medicaid Program; Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26342 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447). Therefore, if the law setting rates does not provide payments sufficient to assure "access" and "quality of care," federal law,

pursuant to the Supremacy Clause of the United States Constitution, preempts that State law.

Principles of federalism mandate the supremacy of federal law. This Court has long assumed that there is a generally available right of action for preemption claims not derived directly from statute or from 42 U.S.C. § 1983 but from the Constitution. This Court should now expressly recognize that preemption claims brought under the Supremacy Clause are necessary to assure the supremacy of federal law.

ARGUMENT

I. The Federal Constitution Is the Supreme Law of the Land

Federalism is a system of government in which power is divided and shared among a national government, state governments, and local governments. The States agreed to a federalist model of government when they ratified the United States Constitution. Under the federal constitution the States affirmatively ceded certain powers to the federal government while retaining others. Article VI, clause 2 of the federal constitution (the "Supremacy Clause") guarantees the national union of the States by mandating that the Constitution, federal laws, and treaties take precedence over State law and binds all judges to adhere to that principle in their courts. Specifically, the Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

> made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

James Madison in advocating for ratification of the Constitution argued that the Supremacy Clause was necessary because State legislatures were invested with all powers not specifically defined in the Constitution. Therefore, absent the Supremacy Clause, the federal constitution would be subservient to various State constitutions. The Federalist No. 44, at 180-84 (James Madison) (Wilder Pub. 2008). In further support of the Supremacy Clause, he argued "as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others." *Id.* at 183. Madison concluded that this would lead to an inverse result with a national government ruled by the States or "a monster, in which the head was under the direction of the members." *Id.* Accordingly, the Supremacy Clause was needed to clearly delineate the competing authorities of the federal and State governments, and by ratifying the United States Constitution the States agreed that in cases of conflict between federal and State law, federal law is supreme.

II. There Is a Cause of Action Under the Supremacy Clause of the Constitution

Alexander Hamilton also defended the Supremacy Clause, stating "[a] *law*, by the very meaning of the term, includes supremacy" because "[i]t is a rule which those to whom it is prescribed are bound to observe." The Federalist No. 33, at 123 (Alexander Hamilton) (Wilder Pub. 2008). If laws were not supreme "[i]t is evident they would amount to nothing." *Id.* Thus, although laws by their nature imply their supremacy, the Supremacy Clause assures that federal laws will be properly executed and will take priority over conflicting State laws. Accordingly, the drafters of the United States Constitution believed that the Supremacy Clause was necessary so that the States affirmatively acknowledged the supremacy of federal law. By ratifying the United States Constitution the States agreed to the supremacy of federal law against conflicting State laws. For the Supremacy Clause to have any meaning, there must be a private right of action to address situations when States enact laws which conflict with federal law.

A. This Court Has Long Recognized a Cause of Action Under the Constitution.

While this Court has refused to imply a cause of action in federal statutes, the Court has consistently recognized causes of action under the United States Constitution. In *Davis v. Passman*, 442 U.S. 228 (1979), Justice Brennan set forth an exposition of jurisdiction, standing, cause of action, and remedies:

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, *see Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv.* Co., 341 U. S. 246, 249 (1951); *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U. S. 490, 498 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the "preconditions" for such equitable remedies. *See Trainor v. Hernandez*, 431 U. S. 434, 440-443 (1977).

Id. at 239 n.18. In *Davis*, the Court was asked to determine whether the U.S. Court of Appeals for the Fifth Circuit correctly determined that a cause of action and a damages remedy did not exist under the

Constitution for violations of the Due Process Clause of the Fifth Amendment. *Id.* at 230. In reversing the Court of Appeal's decision, this Court held that the Court of Appeals used the wrong criteria to determine whether the petitioner should be able to enforce the Fifth Amendment's Due Process Clause. The Court explained that the Court of Appeals erred by applying the "criteria set out in *Cort* v. *Ash*, 422 U. S. 66 (1975), for ascertaining whether a private cause of action may be implied from 'a statute not expressly providing one.'" The Court noted that "the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241-43.

Instead, this Court found that there is a cause of action in the Constitution to enforce constitutional rights, with jurisdiction conferred by the federal question statute. *Id.* The Court noted that:

> [t]he Constitution . . . does not 'partake of the prolixity of a legal code.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of 'its important objects,' *ibid.*, is the designation of rights. And in 'its great outlines,' *ibid.*, the judiciary is clearly discernible as the primary means through which these rights may be enforced.

Similarly, this Court has recognized a cause of action in cases which assert that federal law preempts a conflicting State law or regulation.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162, 28 S.Ct. 441, 454-455, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-200 (1921); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149, 152, (1908); *see also Franchise Tax Board*, ante, at 19-22 and n. 20; Note, *Federal Jurisdiction Over Declaratory Suits Challenging State Action*, 79 Colum. L. Rev. 983, 996-1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. See, *e.g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983).

Since *Shaw*, this Court has recognized a cause of action where a plaintiff seeks prospective declaratory or injunctive relief under the Supremacy Clause to prevent State legislators from enacting laws preempted by a federal statute. This Court has decided the merits of these preemption cases without addressing whether the allegedly preemptive federal statute grants a private right of action to the plaintiff. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco manufacturers and retailers sued Massachusetts to enjoin enforcement of State cigarette advertising restrictions on the ground that the federal Cigarette Labeling and Advertising Act preempts State regulation); *United States v. Locke*, 529 U.S. 89 (2000) (United States alleges that Washington State statute governing the design of oil tankers is preempted by federal statute); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (National Foreign Trade Council sues to enjoin enforcement of Massachusetts law that barred procurement from companies that did business with Burma on preemption grounds); *Foster v. Love*, 522 U.S. 67 (1997) (Louisiana voters challenge State law governing elections as being preempted by federal election statute). Like *Davis v. Passman*, these cases demonstrate that this Court will permit injunctive or declaratory relief on a basis of federal preemption without regard to whether the federal statute provides a private right of action.

This Court's preemption analysis was set forth in *Verizon Maryland., Inc. v. Pub. Serv. Comm'n. of Maryland*, 535 U.S. 635 (2002). In *Verizon*, this Court unanimously reached the merits of a preemption claim while "express[ing] no opinion"

whether there was a private cause of action to enforce the federal telecommunications law even though the State argued that there was no private cause of action in the statute, and therefore, no jurisdiction for the suit. This Court responded to the State's challenge by stating:

> We need express no opinion on the premise of this argument. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."

Id. at 642-43 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)).

This Court found that nothing in the 1996 Telecommunications Act "purports to strip [federal question] jurisdiction." *Id.* at 643. Rather, this Court concluded: "[i]n sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies." *Id.* at 644. Therefore, this Court found that federal question jurisdiction existed, because the law "does not distinctively limit the substantive relief available." *Id.* Specifically, this Court stated that as long as the plaintiff's preemption claim is not frivolous, the district court has federal question jurisdiction to determine whether a State regulation is preempted by federal law, pursuant to the Supremacy Clause. *Id.* at 643. As such, this Court summarily dismissed

the argument that the lack of a cause of action could affect the federal judicial power to adjudicate the plaintiff's preemption claim.

Similarly, in two subsequent Medicaid decisions, this Court reached the merits of preemption questions by assuming, without discussion, the existence of a cause of action. For example, *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) (hereinafter "*PhRMA*"), concerned whether Maine's prescription drug law was preempted by the federal Medicaid statute. In that case, PhRMA sought to enjoin Maine officials from implementing a drug rebate program devised to obtain discounted drug prices for persons not covered by Medicaid. Under the terms of the program, pharmaceutical companies that refused to participate in Maine's drug rebate program were required to submit their drugs to prior authorization procedures under the State's Medicaid Program. *Id.* at 649-50. This Court "assumed *sub silentio* that the plaintiff had a right of action for its claim that the Medicaid statute preempted state law." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 374 (2004).

In a second Medicaid case, *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), this Court unanimously held that an Arkansas statute requiring Medicaid applicants to assign to the State the entirety of any settlement violates the federal Medicaid law's "anti-lien statute," and that the State may recover only from those portions of third party awards allocated for medical expenses. This Court unanimously held

that State law conflicted with federal law and was therefore unenforceable under the Supremacy Clause. Again, as in the *PhRMA* case, this Court reached the merits of the preemption claim without addressing the issue of federal jurisdiction, which was presumed.

B. Principles of Federalism Support a Cause of Action Under the Supremacy Clause

The presumption in favor of a cause of action under the Supremacy Clause is justified by the federal interests underlying the Supremacy Clause—the supremacy of federal law and the need to keep State officials within the bounds of the federal law. Without a cause of action under the Supremacy Clause there would be limited means to address systemic violations of federal laws by State officials. The federal government has finite litigation resources and cannot effectively monitor each State's law to assure that it does not conflict with federal law.[2] Absent judicial resolution of preemption claims, States would presumably continue to enforce

---

[2] To expect the federal government to monitor all State laws to assure that there is no conflict would impose exactly the federal "negative" option which the Convention rejected. *See*, Brief of the Nat'l Governors Assoc et al. as Amici Curiae in Support of Petitioner, p. 15-17. Rather, recognizing a private cause of action under the Supremacy Clause assures that the power of State legislatures to pass needed legislation is only intruded upon when that legislation conflicts with federal law and the State law has imposed a "concrete, particular, and redressable" injury on a party.

laws which conflict with federal laws.[3] Allowing third parties to bring preemption claims is consistent with federal supremacy and the goal of keeping State and federal law in harmony.

As this Court recently stated, "'[F]ederalism secures to citizens the liberties that derive from the diffusion of federal power.'" *Bond v. United States*, 564 U.S. __, No. 09-1227, slip. op. at 9 (June 16, 2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.
>
> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset

---

[3] This case is a prime example. Absent a private cause of action under the Supremacy Clause that provided an entry to federal court, California claims that it could have implemented AB 5 and AB 1183 before and even after HHS found the reductions mandated by AB 5 and AB 1183 did not comply with federal law.

> the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Bond, at 9-10.

> If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.
>
> Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism.

Id., at 11 (citations omitted).

If Petitioner's views prevail, citizens would lose the ability to challenge State laws that conflict with federal laws. As the Court noted in *Davis v. Passman*, actions premised on a violation of the Constitution are distinct from private causes of action brought against private defendants. With respect to private actions, this Court made clear in *Cort v. Ash, supra*, that there is a presumption against a statutory implied right of action for claims against private defendants; however, in *Davis v. Passman, supra*, this Court drew a clear distinction

between implied causes of actions for violations of statutes as opposed to violations of Constitutional protections. The distinction is logical since actions against private defendants charged with federal statutory violations do not implicate any competing State interests. Thus, the *Shaw* preemption cases, discussed *supra*, which permit injunctive relief only against State officials, can be justified by principles of federalism and federal supremacy objectives whereas suits against private defendants do not serve the same objectives.

Moreover, a right of action under the Supremacy Clause does not violate Constitutional separation of powers principles. In contrast to the legislature's proper role of providing enforcement mechanisms for statutory rights, developing constitutional remedies is largely a judicial function. Based on this Court's consistent acceptance of preemption claims, Congress may very well have rightly assumed that an express cause of action for preemption of State laws is unnecessary because the existing jurisprudence provides injunctive relief in successful preemption cases, regardless of whether the underlying federal statute provides an express cause of action. Any claim that Congress must establish a cause of action before an individual can "challenge a law as enacted in contravention of constitutional principles of federalism" lacks merit. *Bond*, slip. op. p. 11. "The Supremacy Clause on its face makes Federal law 'the supreme Law of the Land' even absent an express statement by Congress." *Pliva v. Mensing*, 564 U.S. __, No. 09-993, slip op. at 14 (June 23, 2011) (quoting U.S. Const., art. VI, cl. 2.).

In sum, recognition of a cause of action under the Supremacy Clause is justified by federal supremacy and rule of law objectives and ensures that State and local government officers do not systematically violate federal statutes.

III. A Cause of Action Under the Supremacy Clause Is Particularly Important in Medicaid Cases

If this Court determines that the Supremacy Clause does not provide individuals with a private cause of action, then individuals will have no judicial recourse in cases where federal law preempts laws enacted by State legislatures. For instance, the genesis of these consolidated cases are actions taken by California in 2008 with regard to its Medicaid Program which illustrate the importance of expressly affirming a private right of action under the Supremacy Clause. Among other rate reductions, California attempted to institute a ten percent rate reduction for pharmacy services. Assembly Bill 5, 3d extraordinary sess. (Cal. 2008) ("AB 5") (No. 09-1158, Pet. App. 190-97.) AB 5 never went into effect due to the preliminary injunction entered by the district court premised on a finding that respondents had a private right of action under the Supremacy Clause. California then adopted a five percent reduction on pharmacy reimbursement. Assembly Bill 1183 (Cal. 2008) ("AB 1183") (No. 09-1158, Pet. App. 198-217). The AB 1183 reductions also never went into effect and have been superseded by subsequent legislation. *See* No. 09-1158, Pet. Br. at 9 n.3.

Nearly two years after the State enacted AB 5 and AB 1183, CMS rejected the rate reductions set forth in AB 5 and AB 1183, because California could not demonstrate that the rate reductions mandated by AB 5 and AB 1183 would permit California to meet the access and quality of care provisions of the Medicaid Program. No. 09-958, Gov't Pet. Br. App. 1a-4a.

Pharmacists and pharmacies such as the members of the Associations providing this *amicus* brief are on the front line of providing healthcare services to Medicaid beneficiaries. They serve those who are "most impoverished and who -- because of their physical characteristics [are] often least able to overcome the effects of poverty." *Swiker v. Hogan*, 457 U.S. 569, 590 (1982). "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people." *Id.* (internal quotation marks and citations omitted). It is in the public interest that those with the resources, the incentive, and who suffer an injury that is concrete, particular, and redressable, such as providers, have a means by which they can seek to assure that States do not pass State laws which conflict with federal law intended to protect "the most needy in the country." *Id.* at 572.

A recent study of Oregon's Medicaid Program further evidences the importance of the Medicaid Program. The Study found that as compared to people without insurance, individuals on Medicaid received better health care, prescription drugs and physician visits. Finklestein et al., The Oregon Health Study Group, *The Oregon Health Insurance Experiment: Evidence from the First Year* at 5

(2011), *available at* http://www.nber.orgs.papers/w17190. Although there was a short-term cost to providing care to additional beneficiaries, the long-term effects of access to Medicaid Programs seem to be a healthier, more productive population, which may have less need for costly medical services in the future. *Id.* at 7.

Despite the proven benefits of Medicaid Programs on beneficiaries long-term health, States continually jeopardize the Medicaid Program by reducing providers' rates to unsustainable levels. For example, in spite of the steep reductions envisioned by AB 5 and AB 1183, California planned, contrary to the plain language of the Medicaid regulations, to implement the payment reductions mandated by AB 5 and AB 1183 absent CMS approval. 42 C.F.R. § 430.12(c). Thus, absent a cause of action pursuant to the Supremacy Clause, a State law which CMS subsequently found conflicted with federal law because it failed to assure "access" and "quality of care" for Medicaid beneficiaries would have been in effect for over two years with the consummate loss of "access," "quality of care," and degradation of health among some of the country's most vulnerable. The cause of action the State claims does not exist provided the means for assuring that the improper rate reductions did not happen.

IV. This Court Has Distinguished Between Causes of Action Under the United States Constitution and Those Claims Brought Under 42 U.S.C. § 1983

Petitioners contend that individuals cannot invoke the Supremacy Clause when State law conflicts with federal law unless the statute provides a private cause of action enforceable under 42 U.S.C. § 1983. *See* No. 09-1158, Pet. Br. at 20-26. This argument is not consistent with the different reasoning applied by this Court in analyzing preemption claims under the Supremacy Clause and claims brought under § 1983. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of State law. In *Cort v. Ash*, this Court enunciated a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute. In general, a plaintiff asserting such a right is required to show that (1) membership in the class for whose benefit the statute was enacted, (2) evidence of Congress' intent to confer a private remedy, (3) that a right to sue would be consistent with the statutory purpose, and (4) that the cause of action is not one traditionally relegated to the States to a degree that implying a right to sue would be inappropriate. 422 U.S. 66, 78-79. Under this doctrine, a plaintiff must show that Congress intended to grant both a private right and a private remedy. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

While cases brought under 42 U.S.C. § 1983 are required to meet the Court's stringent "rights"

requirement, this Court enunciated a different analysis for claims alleging a constitutional violation. In *Verizon, supra,* this Court made an important distinction between claims brought under 42 U.S.C. § 1983 for violations of federal statutes or laws and preemption claims brought under the Supremacy Clause. In *Verizon* this Court found that the existence of a statutory cause of action was not relevant to court access. Instead, this Court emphasized in *Verizon* the absence of evidence that Congress intended to foreclose judicial review in cases alleging preemption under the Supremacy Clause. *Id.* at 643-644. The less stringent analysis for cases involving conflicts between federal and State laws adopted in *Verizon* is entirely consistent with federal supremacy and rule of law mandates.

Claims which rest on the Supremacy Clause address, through injunctive relief, a systematic conflict between State and federal laws thereby supporting the federal structure. In contrast, claims brought under 42 U.S.C. § 1983 provide damages to address ad hoc violations of federal law by State officials in executing their official duties. Plaintiffs who suffer ad hoc violations generally do not have standing for prospective injunctive relief because the violations are not ongoing. Conversely, preemption claims under the Supremacy Clause may only be brought for an ongoing conflict between federal law and State law. Thus, the Supremacy Clause creates a private cause of action solely for injunctive relief that addresses systemic violations of law by the States whereas the more appropriate function of § 1983 is to provide damages to address ad hoc violations of law by State officials.

V. Petitioners' Fiscal Arguments Are Not a Basis to Deny a Cause of Action Under the Supremacy Clause

States argue that they will be injured or somehow harmed if they cannot effectively fiscally manage their State Medicaid Programs. This is a red herring. Requiring a State not to enact legislation which conflicts with federal law even when administering its Medicaid Program is not an undue hardship. States voluntarily participate in Medicaid and voluntarily offer pharmacy services. It is disingenuous for States to say they want the fruits of participation in a federally financed program but can pass State laws which conflict with the rules Congress has imposed on that participation.[4] Moreover, as this Court has explained:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable

---

[4] More broadly stated, the States want the benefit of joining the Union, without the risk that a person within the State would successfully seek to enforce that Supremacy of federal law.

> consequence of the principle announced in *Ex parte Young*.

Edelman v. Jordan, 415 U.S. 651, 667-68 (1974).

Depriving individuals of a cause of action to challenge a State law that conflicts with federal law when that law causes them a "concrete, particular, and redressable" injury would strip individuals of the ability to "challenge a law as enacted in contravention of constitutional principles of federalism." *Bond*, slip op. at 11. That such a challenge may affect a State treasury is simply irrelevant.

VI. This Court Should Not Treat Laws Enacted Pursuant to the Spending Clause Differently from Other Federal Laws

While the courts of appeals have uniformly applied *Verizon* in Spending Clause cases, some have claimed that Spending Clause statutes are to be treated differently from other laws. This argument is based on a contract analogy introduced in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) suggesting that Spending Clause statutes function in a manner similar to contracts between the federal and State governments in that federal funds are conditioned on compliance with federal mandates.

This argument has no basis in the text of the Constitution. The Supremacy Clause applies to all federal statutes; nothing in the text of the Constitution limits the scope of the Supremacy Clause for statutes enacted under the Spending Clause. Like all other statutes, laws enacted

pursuant to Congress's power under the Spending Clause are "supreme federal law" that trump State and local laws. This makes perfect sense because federal law is "'the supreme Law of the Land' even absent an express statement by Congress." *Pliva*, slip. op. at 14.

Pennhurst used the contract analogy in concluding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. This principle has been extended to apply to questions of statutory interpretation that affect the amount of the State's financial responsibilities, so that a State must have "clear notice regarding the liability" imposed by the statute. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Permitting private parties to bring a cause of action under the Supremacy Clause would not impose a new condition upon States receiving Medicaid funds. First, the Medicaid statute clearly conditions the grant of federal funds on the State complying with the Medicaid Act's requirements, including the requirements set forth in Section 30(A). Second, the judicial remedy for federal law preemption is an injunction against the ongoing violation. This remedy is standard, and therefore, States have historically been on notice that Courts will enjoin State laws which conflict with federal law.

In sum, assertions based on contract law are not only dubious, but also are irrelevant to preemption claims. Preemption is not based on assent to contract terms but rather on the States' affirmation of the Constitution making federal law supreme. Numerous scholars, as well as courts of appeals,

have pointed out that the applicable cause of action to bring preemption claims is inherent in the Supremacy Clause, just as courts have recognized causes of action to enforce other constitutional provisions. *See, e.g.*, *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005); *Local Union No. 12004, United Steelworkers of Am. v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *see also Sloss*, 89 Iowa L. Rev. at 363. As a result, no additional cause of action is needed in any statute to bring a Supremacy Clause preemption claim, no matter whether its source of congressional authority is the Spending Clause, the Commerce Clause, or any other Constitutional Clause.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

ERIN M. DUFFY
DUANE MORRIS LLP
30 S. 17TH ST.
PHILADELPHIA, PA 19103
(215) 979-1000

DONALD L. BELL II
MARY ELLEN KLEIMAN
NATIONAL ASSOCIATION OF
CHAIN DRUG STORES
413 North Lee Street
P.O. Box 1417-D49
Alexandria, VA 22313
(703) 549-3001

FREDERICK R. BALL
Counsel of Record
NICHOLAS LYNN
DUANE MORRIS LLP
190 South LaSalle Street,
Suite 3700
Chicago, IL 60603-3433
(312) 499-6720
FRBall@duanemorris.com

August 4, 2011

RECORD AND BRIEFS

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
MAY 25 2011
OFFICE OF THE CLERK

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.,

---

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.,

TOBY DOUGLAS, Director of the Department of Health Care Services, State Of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND UNITED STATES CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Michael W. McConnell
Counsel of Record
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
michael.mcconnell@kirkland.com
(202) 879-5000

Counsel for Amici Curiae

May 25, 2011

Library of Congress
Law Library

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

These *amici* will address only the following question of law:

Whether the Supremacy Clause supplies a cause of action to sue in federal court even where the underlying federal law creates neither a federal right nor a defense.

Table of Contents

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE HISTORY OF THE SUPREMACY CLAUSE SHOWS THAT IT DOES NOT GRANT RESPONDENTS A CAUSE OF ACTION WHERE FEDERAL LAW DOES NOT CREATE A RIGHT 3

A. The Supremacy Clause's Antecedents In The Colonial Charters Did Not Recognize Causes Of Action Where English Law Did Not Create A Right. 4

1. The Colonies were required to legislate consistently with English law. 5

2. Enforcement of consistency with English law did not include causes of action for colonists who did not have legal rights. 7

B. The Framers Did Not Intend The Supremacy Clause To Create A Cause Of Action Where There Is No Federal Right To Enforce 13

1. The records of the Constitutional Convention do not indicate that a free-

standing cause of action based on the Supremacy Clause was contemplated where federal law does not create a right. 14

2. Early interpretations do not indicate that the Supremacy Clause was regarded as creating a free-standing cause of action where there is no federal right to be enforced. 19

3. Historical evidence therefore leads to the inference that the Supremacy Clause was not intended to create a free-standing cause of action absent a federal right. 21

II. THIS COURT HAS NOT INTERPRETED THE SUPREMACY CLAUSE AS CREATING A FREE-STANDING CAUSE OF ACTION ABSENT A FEDERAL RIGHT. 22

A. Respondents' Cause Of Action Is Inconsistent With Existing Methods Of Vindicating Federal Rights And Defenses. 22

B. Respondents' Cause Of Action Is Inconsistent With Existing Federal Statutory Remedies. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001) 23, 28

Chapman v. Houston Welfare Rights Org.,
441 U.S. 600 (1979) 22

Dennis v. Higgins,
498 U.S. 439 (1991) 22

Ex parte Tyler,
149 U.S. 164 (1893) 25

Ex parte Young,
209 U.S. 123 (1908) 24, 26

Florida Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 27

Gade v. National Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 26

Geier v. American Honda Motor Co., Inc.,
529 U.S. 861 (2000) 23

Golden State Transit Corp. v. City of Los Angeles,
493 U.S. 103 (1989) 23

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 28

Osborn v. Bank of the United States,
22 U.S. (9 Wheat.) 738 (1824) 24

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978)..... 26

Scott v. Donald,
165 U.S. 107 (1897)..... 25

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 23, 24

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,
552 U.S. 148 (2008)..... 27, 28

Verizon Md. Inc. v. Public Serv. Comm'n,
535 U.S. 635 (2002)..... 26

Virginia Office for Protection & Advocacy v. Stewart,
131 S. Ct. 1632 (2011) 24, 25, 26

Williams v. Neely,
134 F. 1 (1904) 25

Williamson v. Mazda Motor of Am., Inc.,
131 S. Ct. 1131 (2011) 23

Statutes

42 U.S.C. § 1396a(a)(30)(A)..... 27

42 U.S.C. § 1983 ..... 23, 28, 29

Books

Bilder, Mary Sarah, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2004) ..... passim

Hamburger, Phillip, *Law and Judicial Duty* (2008) 8, 9, 10

Johnson, Samuel, *A Dictionary of the English Language* (6th ed. 1785) 6, 7

McDonald, Forrest, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985) 18

Pomeroy, John Norton, *A Treatise on Equity Jurisprudence as Administered in the United States of America* (5th ed. 1941) .. 25

Russell, Elmer Beecher, *The Review of American Colonial Legislation by the King in Council* (1915) 8

Smith, Joseph Henry, *Appeals to the Privy Council from the American Plantations* (1950) 11

Story, Joseph, *Commentaries on the Constitution of the United States* (1833) 20, 21, 22

The Federalist (Clinton Rossiter ed., 1961) ... 19, 20

The Records of the Federal Convention of 1787 (Max Farrand ed., rev'd ed. 1966) ..... passim

Thorpe, Francis Newton, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* (1909) 5, 6, 7

Weir, David A., *Early New England: A Covenanted Society* (2005) 6

Articles

Harrison, John, Ex Parte Young, 60 Stan. L. Rev. 989 (2008) 25

Hart, Jr., Henry M., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 26

Schlesinger, Arthur M., *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. 279 (1913) 10, 11

Other Source

Cong. Globe, 42d Cong., 1st Sess. (1871) 29

INTEREST OF *AMICI CURIAE*[1]

Amici — the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the International City/County Management Association, and the United States Conference of Mayors — are national organizations whose members include State, county, and municipal elected and appointed officials from across the United States. These organizations regularly file *amicus* briefs in cases that, like this one, concern federalism and raise pre-emption challenges.

In this case, the Court will decide whether the Ninth Circuit misconstrued the Supremacy Clause and expanded the scope of pre-emption under which private parties without federal rights or defenses may seek legal and equitable relief to enforce their own notions of what federal statutes require of States.

If the Ninth Circuit's opinion stands, certain discretionary decisions may be subject to lawsuit or frozen by injunction by any private party with standing that believes a State or locality has misread federal law.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* or their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

Not only would this impose new costs in dollars and time, such a free-standing cause of action would have a chilling effect on new and creative State and local solutions to dynamic fiscal and policy circumstances. For these reasons, the *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that Respondents in this case have no right of action under any federal statute. It is also undisputed that Respondents are not subject to any State enforcement action to which federal law might serve as a defense. The Court of Appeals nonetheless held that the Supremacy Clause itself supplies a cause of action, permitting plaintiffs to bring suit in federal court for pre-emption of State law in any case where they have standing. We submit that is in error. Understood in light of its history and subsequent interpretation, the Supremacy Clause is a priority rule that makes clear that, whenever a conflict between State law and federal law arises in the course of litigation, courts must give precedence to the federal law. The Supremacy Clause is not a roving commission to allow plaintiffs to seek judicial correction of perceived conflicts between State and federal law, where they personally have neither a right nor a defense under federal law.

ARGUMENT

I. THE HISTORY OF THE SUPREMACY CLAUSE SHOWS THAT IT DOES NOT GRANT RESPONDENTS A CAUSE OF ACTION WHERE FEDERAL LAW DOES NOT CREATE A RIGHT.

The Supremacy Clause is a solution to the inherent potential conflict in a two-tiered federal system in which the several States and the general government have overlapping authority to legislate in certain areas. As debates in the Philadelphia

Convention reveal, the Supremacy Clause was crafted as an alternative to James Madison's favored solution of a congressional "negative" on State laws, and was based on the Americans' prior experience of a kind of federalism within the British imperial system. *See* Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 11 (2004). That system allowed the colonial legislatures substantial powers of local self-government within boundaries set by British law.

The British imperial system — dubbed by historians the "transatlantic constitution" — employed two basic procedural mechanisms for ensuring that colonial law did not offend British law. Some, but not all, colonies were required to send copies of enacted statutes to London for review by the Lords of the Committee for Trade and Plantations (commonly called the "Board of Trade"), which had the power to annul colonial laws deemed repugnant to British law. *Id.* at 54-57. This was the model for Madison's "negative." In addition, parties in ordinary litigation in colonial courts could appeal to London — to the Privy Council's Committee for Hearing Appeals from the Plantations, which acted in an essentially judicial capacity — in cases of claimed repugnancy between colonial and British law. *Id.* at 73-90, 125-26. This became the model for the Supremacy Clause.

A. The Supremacy Clause's Antecedents In The Colonial Charters Did Not Recognize Causes Of Action Where English Law Did Not Create A Right.

The concerns reflected in the Supremacy Clause were not new at the time of the Constitutional

Convention. Long before the American colonies declared their independence, the question of how to ensure consistency between a supreme central authority and peripheral legislatures was a concern of British imperial administrators. Their answers to that question are reflected in the colonial charters granted in the seventeenth and early eighteenth centuries.

1. The Colonies were required to legislate consistently with English law.

The transatlantic constitution permitted substantial local self-government, thus contemplating a certain amount of divergence from British legal norms. At the same time, however, colonial charters required adherence to fundamental British law and forbade the enactment and enforcement of laws "repugnant" to British law. The Second Charter of Virginia, for example, adopted in 1609, granted the colonial Council "full and absolute Power and Authority to . . . govern . . . according to such Orders, Ordinances, Constitutions, Directions, and Instructions, as by our said Council as aforesaid, shall be established[.]" *See* Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* 3801 (1909) ("*Federal & State Constitutions*").[2] That

---

[2] This charter, and the other colonial charters cited herein, is also available online through the Avalon Project at the Yale law

authority, however, came with a proviso: It would hold on condition that "the said Statutes, Ordinances and Proceedings as near as conveniently may be, be *agreeable* to the Laws, Statutes, Government, and Policy of this our Realm of England." *Id.* (emphasis added).[3]

Later colonial charters added a degree of clarity to the requirement that colonial law be "agreeable" to that of England. In most charters, that requirement evolved into the rule that colonial governments could not contradict English law. The Third Charter of Virginia, for example, required that Virginia's laws "*be not contrary to* the Laws and Statutes of this our Realm of England[.]" *Id.* at 3806 (emphasis added). The 1629 Massachusetts Bay Charter granted power to legislate so long as the laws "be not contrarie or repugnant" to English law. *See id.* at 1853.[4] The 1662 Connecticut charter granted authority to enact legislation "not Contrary to" English law, *id.* at 533; likewise the 1732 Georgia Charter required that colonial laws "be reasonable and not contrary or repugnant to the laws or statutes" of England, *id.* at

---

library. *See* http://avalon.law.yale.edu/subject_menus/statech.asp.

[3] "Agreeable," as defined by Samuel Johnson, meant "[s]uitable to; consistent with; conformable to." I Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (unpaginated) ("Johnson").

[4] An informative discussion of the development of Massachusetts and other New England colonial charters can be found in David A. Weir, *Early New England: A Covenanted Society* (2005).

770.[5] *See also, e.g., id.* at 3215 (1663 Rhode Island Charter ("not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutions of the place and people there")); *id.* at 2765 (1665 Carolina Charter ("reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England")). These provisos foreshadowed our modern idea of conflict pre-emption.

In contrast to the later Supremacy Clause, not all Acts of Parliament were superior to colonial law. In general, it was thought that the "plantations" were subject to some or all of the common law that had been in effect at the time of settlement. Subsequent Acts of Parliament applied to the "plantations" only if they were expressly mentioned or if the colonies voluntarily adopted them. *See* Bilder, *The Transatlantic Constitution* at 37-39.

2. Enforcement of consistency with English law did not include causes of action for colonists who did not have legal rights.

Enforcement of consistency between colonial and English law was the responsibility of the English Privy Council. The Privy Council had both

---

[5] Johnson defined "contrary" as "[o]pposite; contradictory; not simply different, or not alike, but repugnant, so that one destroys or obstructs the other," or as "[i]nconsistent; disagreeing." I Johnson. "Repugnant" meant "[c]ontrary; opposite; inconsistent." II Johnson.

administrative and legal means at its disposal for that task. *See* Phillip Hamburger, *Law and Judicial Duty* 261 (2008) ("The Privy Council served as a judicial court to hear appeals from colonial courts, but it also oversaw the Empire[.]").

The principal administrative method of enforcing consistency with English law was direct review of colonial statutes, followed by approval or disallowance. Originally applied only to Royal colonies, by 1700 most colonial charters had adopted the requirement that the colonial assemblies send their laws to England for such review. *See* Bilder, *The Transatlantic Constitution* at 54-56. [6]

Review of colonial statutes from 1696 through Independence was conducted by the Lords of Trade and Plantations, usually called the Board of Trade, which advised the Privy Council on statutes sent for review. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 44 (1915). The Board of Trade would sometimes focus on colonial statutes brought to its attention by petitions from parties who claimed to be injured by them, *id.* at 50, and it gradually adopted quasi-judicial procedures for its hearings, *id.* at 51-52. But the Board of Trade was not a court; its proceedings were not strictly judicial in nature; and its

---

[6] Rhode Island lacked such a provision. The ultimate English authority over Rhode Island, in fact, was the threat that its charter would be revoked. To avert that outcome, the colonial legislature put considerable effort into ensuring that its laws would be consistent with those in England (and convincing English authorities of that consistency). Bilder, *The Transatlantic Constitution* at 57-69.

proceedings were not triggered by anything like a legal complaint and cause of action. Rather, the Board's authority was essentially political and administrative. Hamburger, *Law and Judicial Duty* at 261 (referring to the disallowment of colonial legislation as an "executive" function). Significantly (and similar to Madison's later proposal for a "negative" at the Convention), the Board was charged not only with the job of determining whether colonial legislation was consistent with English law, but whether it was expedient and consistent with the Empire as a whole. Russell, *Review of American Colonial Legislation* at 109. That was necessarily a matter not just of law, but of policy. *See, e.g., id.* at 118 (discussing the Board's role in preventing the colonies from competing with English industries); 120-21 (Board's role in regulating colonial paper currency).

Other charters provided for judicial process to ensure conformity of colonial to British law. This took the form of a right for litigants in colonial cases to appeal adverse court judgments to the Privy Council, which would protect the rights or defenses that English law conferred. The 1622 Gorges Charter, for example, provided that when the Maine colonial government was in "default" of its obligation to conform to English law, "it shall be lawful for any of the aggrieved inhabitants and planters . . . to appeal" to the Council of New England, based in Devonshire. *Federal & State Constitutions* at 1624. King Charles II's 1676 Grant of New England to the Duke of York was even more explicit. That charter, just after familiar language requiring that colonial laws "be not contrary to, but as near as conveniently may be, agreeable" to English law, added a provision

"saving and reserving to us . . . the receiving, hearing, and determining of the appeal and appeals of all or any person or persons of, in or belonging to the territories or islands aforesaid, in or touching any judgment or sentence to be there made or given." *Id.* at 2591-92. The 1681 Pennsylvania Charter was similar: It required that colonial laws "bee consonant to reason, and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the Lawes and Statutes, and rights of this Our Kingdome of England," and then reserved to the Crown "the receiving, heareing, and determining of the appeale and appeales of all or any Person or Persons, of, in, or belonging to the Territories aforesaid, or touching any Judgement to bee there made or given." *Id.* at 3038. Some sources indicate that the right to appeal to the Privy Council was considered an inherent right of the King's subjects, even without express mention in the charter, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. 279, 288 (1913), but some colonies contested the right of appeal, contending that it, along with other elements of royal prerogative, had been vested in colonial authorities by the charter. *Id.* at 293-97; *Bilder, The Transatlantic Constitution* at 73-90.

In contrast to direct review of colonial statutes by the Board of Trade, appeals were conducted by the Privy Council's Committee for Appeals, which had a judicial character. Hamburger, *Law and Judicial Duty* at 261 (referring to the hearing of appeals from colonial courts as an exercise of the Privy Council's "judicial capacity"); *see also* Bilder, *The Transatlantic Constitution* at 74 (discussing the formalization of appellate practice in the 1690s). If

the colonial court granted leave, review in the Committee was by appeal; if not, review was by petition. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 437. Litigation before the Committee was conducted by members of the bar, based on the formal record on appeal, subject to ordinary legal rules, and resulted in a legally binding judgment of either affirmance or reversal followed by a remand to the colonial court. *See* Bilder, *The Transatlantic Constitution* at 122-28; Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 437-38.

Appeals were not conceived as arising under the transatlantic constitution's "repugnancy" principle, for mere repugnancy of colonial to English law did not supply the underlying cause of action. Rather, the appeals arose in ordinary cases, which were based on ordinary causes of action implicating personal rights at admiralty, common law, or equity. "Repugnancy" served instead as an argument on the merits. *See id.* at 85-86. In other cases, English law was a defense to application of "repugnant" colonial law. *See* Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* 561 (1950).

For example, historian Arthur Schlesinger Sr. identified three Privy Council appeals of the greatest legal significance for the validity of colonial statutes: *Winthrop v. Lechmere*, *Phillips v. Savage*, and *Clark v. Tousey*. Each implicated the validity of colonial statutes, and each arose from a dispute between an heir who stood to gain from the colonial intestacy statutes and an heir who stood to receive more under the English common law rule. Schlesinger, *Colonial*

Appeals to the Privy Council, 28 Poli. Sci. Q. at 440-45.

In Rhode Island, the first successful private-party appeal from Rhode Island to the Privy Council involved a land dispute that ultimately turned on whether a colonial law constituting the colonial Assembly as a court of equity was repugnant to British law, which confined equity to the prerogative courts of the Crown. Bilder, *The Transatlantic Constitution* at 80-82. This resolved an important and contested question of the respective authority of colonial and royal courts, *id.* at 79, but it arose in an ordinary case about ownership of land.

Another illustrative example from Rhode Island was the litigation brought by James MacSparran, a clergyman of the Church of England, to clear title to lands set aside for support of an "orthodox" minister. The colonial court concluded that this meant, in context, the Congregationalist claimant. MacSparran appealed to the Privy Council on the ground that only a minister of the Church of England could be deemed "orthodox" under English law. The Privy Council's decision against MacSparran was an important decision restricting the reach of the established church in the colonies. *Id.* at 159-167. But despite its broad significance, the cause of action was MacSparran's mundane allegation of trespass against the lessee of a rival claimant. *Id.* at 160. In the absence of an established common law cause of action, there could have been no case, and there could have been no appeal. Neither the importance of the question nor the allegation of "repugnance" in the abstract would have sufficed.

Some charters, in short, subjected colonial laws to an English veto. Although colonists could (and did) petition English authorities for the invalidation of colonial statutes, such petitions were fundamentally political and administrative in nature, rather than judicial in the modern sense. Other charters took a judicial approach, permitting appeals to English tribunals of colonial judgments and sentences in the course of ordinary litigation. It therefore appears that although the colonies were prohibited to enact legislation conflicting with English law, that prohibition did not alter the principle that litigants can go to court for judicial relief only if they satisfy the ordinary requirements of a cause of action in law or equity.

B. The Framers Did Not Intend The Supremacy Clause To Create A Cause Of Action Where There Is No Federal Right To Enforce.

The questions of imperial administration that appeared during the colonial period surfaced once again in designing a federal union. The Framers, in their effort to resolve the problems that plagued the United States under the Articles of Confederation, had to decide how to ensure that the States would exercise their sovereignty consistently with the Union and the federal Constitution. Both forms of imperial review described above — direct review and judicial appeal — were urged at the Convention, with explicit reference to prior British imperial practice. The Supremacy Clause's history at the Convention indicates that it was adopted as the less intrusive remedy from the point of view of the States.

Early explications of the Supremacy Clause confirm that view.

1. The records of the Constitutional Convention do not indicate that a free-standing cause of action based on the Supremacy Clause was contemplated where federal law does not create a right.

For the first half of the Constitutional Convention, it was assumed that the supremacy of federal law would be enforced by Congress on analogy to the post-enactment review of colonial statutes by the Board of Trade. The Virginia Plan vested the National Legislature with power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." I *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., rev'd ed. 1966) ("Farrand"). Charles Pinckney and James Madison sought to expand the negative to allow invalidation of any State law the Congress "shd. judge to be improper," thus permitting Congress to invalidate State laws on the basis of policy as well as unconstitutionality. *Id.* at 164. Both supporters and opponents of the negative drew analogies to review of colonial statutes by the Board of Trade. *See id.* (C. Pinckney) ("under the British Govt. the negative of the Crown had been found beneficial, and the States are more one nation now, than the Colonies were then."); *id.* at 168 (Madison) ("This was the practice in Royal Colonies before the Revolution"); *id.* at 337 (Lansing) (the proposed "Negative would be more injurious than that of Great Britain heretofore was"); II Farrand at 28 (Madison)

(the "utility" of the negative "is sufficiently displayed in the British System").

The Framers agreed that the Union would require some sort of federal check on State legislation inconsistent with the Constitution. The debate centered on whether that check would be best exercised on a blanket basis by Congress or by courts when the issue arose in ordinary litigation. On July 17, 1787, James Madison, the congressional negative's most important supporter, called the "power of negativing the improper laws of the States" the "most mild & certain means of preserving the harmony of the system," reminding his listeners of the "utility" of the device in the prior "British System." II Farrand at 28. Other delegates were skeptical or even hostile to this idea. Luther Martin called the negative "improper & inadmissible," on the ground that State laws should not have to be "sent up to the Genl. Legislature before they shall be permitted to operate[.]" II Farrand at 27. Even nationalist Gouvernour Morris declared that the negative would "likely be terrible to the States." II Farrand at 27. Future Chief Justice John Rutledge declared that the presence of the negative "would damn and ought to damn the Constitution." II Farrand at 391. It would bind the States "hand and foot" and make "mere corporations of them." *Id.*

Most significantly, Morris and Roger Sherman argued that a negative was unnecessary because courts would not treat a State law as valid if it came into conflict with the Constitution. *Id.* at 27, 28. Morris explained that any law that "ought to be negatived" would be "set aside" in court anyway or else "repealed by a Nationl. law." *Id.* at 28.

Sherman added that the argument for the negative rested on the false premise that State laws inconsistent with the Constitution would be valid otherwise. *Id.* at 28. In light of the familiarity to the Framers of the practice of appeals under the prior British transatlantic system, this was not a surprising reaction. Madison did not disagree, but worried that State courts could not be relied on to disregard invalid legislation as his opponents supposed. *Id.* at 27. Notwithstanding Madison's concerns, the Convention voted down the negative by seven States to three. *Id.* at 28.

It was at that point that the Convention substituted the language that, with later changes, eventually became the Supremacy Clause. That proposal passed unanimously and without recorded discussion. *Id.* at 28-29. Luther Martin, who offered the successful motion, wrote that he proposed the Supremacy Clause "in substitution of" the negative. III Farrand at 286.[7] The unmistakeable inference is that the Convention resolved the debate over how to enforce the supremacy of federal law by reliance on the judicial duty to apply federal law in cases of

---

[7] The July 17 motion borrowed the language of ¶6 of the New Jersey Plan. *See* I Farrand at 245 ("Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them . . . shall be the supreme law of the respective states so far forth as those Acts . . . shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary nonwithstanding[.]"). After subsequent changes, described below, Martin declared the final version "worse than useless." III Farrand at 287.

conflict rather than by post-enactment inspection and political review.

It is important to note that the Convention did not invest courts with a special power to enforce federal supremacy, but evidently contemplated that conflicts would arise, as they had under the prior British system, in the ordinary course of litigation. The courts' power was not conceived as the enforcement of federal mandates (although some federal statutes surely could be coercively enforced), but simply the decision as to which laws, State or federal, would prevail, and which would be void.

In its original form, as adopted on July 17, the Supremacy Clause relied on "the Judiciaries of the several States" to enforce the supremacy of federal law, presumably with appeal to the Supreme Court. II Farrand at 29. At this point, there had been no provision for creation of the lower federal courts. The July 17 version thus closely resembled the prior system of Privy Council appeals, with State courts playing the role of colonial courts, and the United States Supreme Court playing the role of the Privy Council.

The Clause underwent significant substantive revision, first by the Committee on Detail and later by the Committee on Style. According to Edmund Randolph's notes from meetings of the Committee on Detail, the Committee considered a version of the Clause stating that "All laws of a particular state, repugnant hereto, shall be void." II Farrand at 144. The draft further provided that the "decision thereon" would be "vested in the supreme judiciary." *Id.* The language of "repugnancy" harkened back to prerevolutionary colonial charters, and the term

"void" indicated the essentially negative nature of contemplated relief. The Committee, however, rejected this draft in favor of language similar to the July 17 version, but vesting decisions in "the judges in the several states," rather than "the Judiciaries of the several States," a change that entailed enforcement of the supremacy of federal law by inferior federal courts as well as by State courts. *Id.* at 183.[8] This presumably mitigated Madison's concern about reliance on State courts. A change on the floor on August 23, 1787 expanded the scope of federal supremacy beyond "Acts of the Legislature of the United States" to include *all* federal law, including the Constitution itself. *Id.* at 381-82. Lastly, the Committee on Style broadened its language to include future treaties and completed it with the "supreme law of the land" language we are familiar with today. *Id.* at 603.

In the final days of the Convention, Charles Pinckney sought to revive the congressional negative, this time with the proviso that it could be exercised only by a two-thirds vote of both houses of Congress. *Id.* at 390. Some delegates supported it. James Wilson, for example, thought that "[t]he firmness of Judges is not, of itself, sufficient" to ensure federal supremacy. *Id.* at 391. Sherman and Hugh Williamson, though, "thought it unnecessary" in light of federal legal supremacy. *Id.* at 390-91.

---

[8] By changing the language from "Judiciaries" to "judges," the Committee on Detail also made clear that judges, not juries, would decide questions of pre-emption and constitutionality. *See* Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 255 (1985).

After a short debate, this version of the negative failed as well. *Id.* at 391.

Wilson's indirect reference to the Supremacy Clause virtually sums up the Convention's debate. That courts would have a duty to "set aside" State laws inconsistent with the Constitution does not appear to have been in doubt. As shown by these debates, the Convention rejected the negative at least in part on the belief that courts would have a duty to accomplish the same end, in a less intrusive manner.

2. Early interpretations do not indicate that the Supremacy Clause was regarded as creating a free-standing cause of action where there is no federal right to be enforced.

Two essays of *The Federalist*, numbers 33 (Alexander Hamilton) and 44 (James Madison), analyze of the meaning of the Supremacy Clause. *The Federalist* (Clinton Rossiter ed., 1961). Neither Hamilton nor Madison specifically addressed any charge that the Supremacy Clause by itself could be used as a basis to hale States into court on an abstract pre-emption theory where there is no federal right to be enforced — though that argument surely would have been made by Anti-federalists if they had considered it possible. Instead, wrote Hamilton: "If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed." *Id.* No. 33, at 204. Otherwise, the

larger political association would "be a mere treaty . . . and not a government, which is only another word for political power and supremacy." *Id.* (emphasis omitted). For that reason, the Supremacy Clause *"only declares a truth which flows immediately and necessarily from the institution of a federal government."* *Id.* at 205 (emphasis added).

Madison took a similar view. Because many of the existing State constitutions reserved to themselves the powers not granted to the United States under the Articles of Confederation (or, indeed, "d[id] not even expressly and fully recognize the existing powers of the Confederacy"), it was necessary to vest supreme authority in Congress. *Id.* No. 44, at 286-87. If the Constitution had (hypothetically) contained a savings clause instead, Madison observed, "the new Congress would have been reduced to the same impotent condition with their predecessors," *id.* at 286, and federal laws might even have had different application in different States, *id.* at 287.

Joseph Story, writing decades later, reached much the same conclusion. Seconding Hamilton, Story wrote that the Supremacy Clause "only declares a truth, which flows immediately, and necessarily from the institution of a national government." III Joseph Story, *Commentaries on the Constitution of the United States* § 1831, p. 694 (1833) ("Story"). "The propriety" of the Clause "would seem to result from the very nature of the constitution." *Id.* at 693. Its principle therefore would have been "necessarily implied" if it had not been in the text, *id.*, but it was "introduced from abundant caution, to make its obligation more

strongly felt by the state judges." *Id.* at § 1833, p. 697.

In explaining "Rules of Interpretation" of the Constitution, Story wrote: "Whenever the question arises, as to whom obedience is due," *i.e.*, to a State or to the federal government, "it is to be judicially settled" by the Supremacy Clause, "and being settled, it regulates, at once, the rights and duties of all the citizens." I Story at § 414, p. 397. Thus, where federal law creates a right or a defense, there is a right to judicial relief, and the Supremacy Clause establishes the rule of decision. But the Supremacy Clause is not a cause of action otherwise.

3. Historical evidence therefore leads to the inference that the Supremacy Clause was not intended to create a free-standing cause of action absent a federal right.

The historical evidence makes it deeply improbable that the Supremacy Clause of its own force was understood to create a federal cause of action for pre-emption even when no federal rights or defenses are at issue. Indeed, in light of the role the Supremacy Clause served at the Convention — a consensus measure when the Framers decided against comprehensive federal review of State legislation — interpreting the Clause as creating a cause of action of that sort would be quite a stretch. The Clause, after all, contemplated the resolution of State-federal legal conflicts during ordinary litigation as a substitute for a highly intrusive review of State legislation. To treat it as authorizing private lawsuits in *all* cases of arguable federal pre-

emption would replicate much of the intrusion the opponents of the negative found troubling, and that the Supremacy Clause was intended to avoid.

II. THIS COURT HAS NOT INTERPRETED THE SUPREMACY CLAUSE AS CREATING A FREE-STANDING CAUSE OF ACTION ABSENT A FEDERAL RIGHT.

The Supreme Court's past pronouncements on the Supremacy Clause are consistent with this historical understanding. Briefly, they establish that the Supremacy Clause provides a rule for resolution of conflicts between State and federal law when they arise in the course of ordinary litigation, but it does not create the free-standing cause of action contemplated by Respondents.

A. Respondents' Cause Of Action Is Inconsistent With Existing Methods Of Vindicating Federal Rights And Defenses.

This Court has explained that the Supremacy Clause "is not a source of *any* federal rights[.]" *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (emphasis added); *accord Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (contrasting the Supremacy Clause with the Commerce Clause). Rather, the Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Chapman*, 441 U.S. at 613. The "right," in other words, must derive either from some other provision of the Constitution itself or from federal statute. This echoes Justice Story's view that the Supremacy Clause "settle[s]" the question of federal supremacy "[w]henever [it] arises." I Story at § 414, p. 397. The question is *how*

conflicts between federal rights and State laws, resolvable through the Supremacy Clause, actually arise. Caselaw shows that absent a federal right or defense, the Supremacy Clause of its own force does not provide a cause of action.

As a general matter, federal rights "come into conflict with state law" in the context either of State enforcement of pre-empted law or the enforcement of federal rights. For example, it is elementary that when a State applies its law (including tort law) in a suit against a federally regulated entity, the defendant is free to raise federal pre-emption as an affirmative defense. *See, e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (addressing alleged pre-emption of State tort law by Federal Motor Vehicle Safety Standards); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (same). Likewise, when a federal statute such as 42 U.S.C. § 1983 provides a private cause of action for vindication of federal rights, parties holding those rights can go to court to seek affirmative relief, including injunctive or declaratory relief against pre-empted State law. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). It is undisputed in this case that Respondents have no federal rights under the statute, so these uses of the Supremacy Clause do not pertain.

Under carefully defined circumstances, parties have a right in equity to assert an anticipatory defense against the enforcement of a pre-empted State law, and to obtain relief in the form of a writ of injunction or prohibition. *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (recognizing federal court jurisdiction over a plaintiff's suit in

equity to enjoin a State regulation that infringes federal rights); *Ex parte Young*, 209 U.S. 123, 160-62 (1908). As Justice Kennedy has recently explained, the "negative injunction" available in such cases is "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring). In this case, the plaintiffs have no "defense" that they could assert in an enforcement action by the State of California. Consequently, these cases do not pertain either.

As the *Shaw* Court explained, the right to invoke the supremacy of federal law in cases of threatened enforcement of pre-empted State law is essentially an application of the equitable principles underlying *Ex parte Young*. *See Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*, 209 U.S. at 160-62).[9] Suits of this type trace their history as far back as *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and are now largely uncontroversial. Like the uses of the Supremacy Clause described above, such suits seek to assert federal constitutional or statutory rights — often, an implied federal right not to be subject to pre-empted State coercive authority — that void State enforcement proceedings. *See Ex parte Young*, 209 U.S. at 155-56. Thus, although the

---

[9] The question presented in *Ex parte Young* was not whether the plaintiff had a cause of action, but whether sovereign immunity would bar such a suit. The underlying equitable principles were not contested.

regulated party brings the lawsuit, the Supremacy Clause is still a shield dependent on a federal right or defense, not a cause of action for affirmative relief.

Historically, in fact, the type of equitable action asserted in *Shaw* could *only* be used as a shield, and the Supremacy Clause functioned only as the rule of decision. The plaintiff in *Ex parte Young* sought an anti-suit injunction under federal equity law, which supplied an equitable cause of action. *See generally* John Harrison, Ex Parte Young, 60 Stan. L. Rev. 989 (2008); *id.* at 1014. In cases like *Ex parte Young*, plaintiffs seeking such an injunction had to show (1) a legal defense (such as pre-emption) to an impending legal action and (2) an argument that waiting to assert the defense at law would not be an adequate remedy. *Id.* at 997-999, 1014; *Scott v. Donald*, 165 U.S. 107, 114 (1897) ("[T]he circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him[.]") (quoting *Ex parte Tyler*, 149 U.S. 164, 191 (1893)); *see also* IV John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1363, p. 981-83 (5th ed. 1941); *Williams v. Neely*, 134 F. 1, 4 (1904) (discussing an equity case brought to pre-emptively assert a contractual defense). Those two prerequisites have been satisfied in every case in which this Court has upheld relief based on federal supremacy, whether they have been explicitly addressed or not. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1642 (majority opinion) (plaintiff must have "a federal

right" in order to seek judicial relief under *Ex parte Young*). By contrast, Respondents in this case, lacking a federal right or defense, could not have made out such as claim.

In addition, under equity, only negative injunctive relief was permitted. The *Ex parte Young* Court emphasized that the rule it announced would not extend to offensive uses of equitable causes of action, like Respondents' effort to force States to take affirmative action to conform to federal law in the absence of a federal right. *Ex parte Young*, 209 U.S. at 158; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 516 (1954) (distinguishing between negative injunctive relief permitted by *Ex parte Young* and affirmative relief foreclosed by the Eleventh Amendment). This Court has recently reiterated that very point. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1639 (no right under *Ex parte Young* to seek specific performance of State's contract).

Shaw and its antecedents, therefore, support use of the Supremacy Clause by litigants with federal defenses to prospective State enforcement action, but not otherwise. The cases erroneously cited by the Ninth Circuit panel to support its more expansive reading of the Clause, to create a federal cause of action without a federal statutory right or defense, are not to the contrary. *Accord Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 640 (2002) (enforcement of State administrative ruling), *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 94 (1992) (enforcement of State licensing laws), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 (1978)

(enforcement of State oil tanker restrictions); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 134 (1963) (enforcement of State agricultural standards).

B. Respondents' Cause Of Action Is Inconsistent With Existing Federal Statutory Remedies.

To expand the cause of action contemplated by *Ex parte Young* and *Shaw* to plaintiffs without federal rights or defenses, furthermore, would bring it into tension with the causes of action actually enacted by Congress, and with the limitations this Court has placed on implying additional statutory causes of action.

All parties, including Respondents, appear to agree that Congress did not intend 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act to create a private right of action, and that this Court's test for implying a statutory cause of action therefore is not met. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008). And yet Respondents have brought suit to enforce that provision against the State of California for their own benefit. To put the matter most starkly, all parties agree that Section 1396a does not create a private cause of action, *but Respondents are suing under it anyway*, aided by nominal reliance on the Supremacy Clause. Respondents' use of the Supremacy Clause would override the limitations this Court has properly placed on implied statutory causes of action.

The consequences would be extraordinary. Today, this Court finds implied statutory causes of

action "*only* if the underlying statute can be interpreted to disclose [congressional] intent to create one[.]" *Stoneridge*, 552 U.S. at 164-65 (emphasis added). That rule rests on the sound presumption that "[t]he decision to extend the cause of action is for Congress, not for us." *Id.* at 165. This Court's role has been "to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And in the absence of Congressional intent, this Court has held "that a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87. Respondents' theory, in contrast, would mean that *every* federal statute implicitly authorizes a private cause of action against State or local governmental defendants under the Supremacy Clause, whether it creates causes of action or affirmative defenses or not, so long as it has potentially pre-emptive effects. By limiting implied causes of action before, this Court has rejected that position, and should do so again.

Respondents' Supremacy Clause theory would also supplant much of Section 1983, which (as mentioned above) creates an injunctive remedy for violations of federal rights but not a free-standing cause of action in all instances of alleged pre-emption. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (plaintiffs may not sue under § 1983 for State violation of federal statute unless the statute creates an "unambiguously conferred right"). Virtually every suit for an injunction under Section 1983, after all, could be characterized as alleging

federal pre-emption, and under the Ninth Circuit's reasoning all a plaintiff would then need to establish is standing. Respondent's Supremacy Clause cause of action, in other words, renders a statutory cause of action and remedy almost entirely redundant.

That effect is even more striking because members of the Congress that enacted Section 1983's predecessor in 1871 evidently believed that its equitable remedies were *new*, and necessary to vindicate federal rights. Senator Frelinghuysen supported the bill on the ground that an "injured party should have an original action in our Federal courts, so that by injunction . . . he could have relief" for violations of his rights. Cong. Globe, 42d Cong., 1st Sess., at 501 (1871). Senator Carpenter said that before the Fourteenth Amendment, Congress lacked the "affirmative power" to "save the citizen from the violation of any of his rights by the State Legislatures[.]" "[T]he only remedy," he said, "was a judicial one *when the case arose*." *Id.* at 577 (emphasis added). Just as the Supremacy Clause's history indicates, vindication of federal rights had to await occasion for defensive use. As for affirmatively compelling State compliance with federal law, Representative Lowe understood it to be impossible without Section 1983: "The Federal Government cannot serve a writ of *mandamus* upon State Executives . . . to compel them to . . . protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. . . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* at 376. Even against the background of federal cases such as *Osborn*, which acknowledged an *Ex parte Young*-type action

as early as 1824, Congress understood itself to be creating a new equitable remedy that would not have existed otherwise. Respondents' argument that the same remedy was always available under the Supremacy Clause disregards this evidence of congressional intent.

The cause of action asserted by Respondents would be a departure from the Supremacy Clause's history and meaning and would radically rework the principles and authorities governing the assertion of federal supremacy against the States today. Because Respondents lack either a federal cause of action or a federal equitable right to be free of pre-empted State enforcement, federal law gives them no basis for relief.

CONCLUSION

The Court should reverse the judgment of the United State Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Michael W. McConnell
Counsel of Record
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
michael.mcconnell@kirkland.com
(202) 879-5000

Counsel for Amici Curiae

May 25, 2011